TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 293.

WILLIAM ADAIR, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

FILED APRIL 20, 1908.

(20,854.)

(20,685.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

No. 720.

WILLIAM ADAIR, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

INDEX.

	Original.	Print.
Caption	1	1
Order returning indictment	1	1
Indictment	1	1
Order for capias and continuance	5	3
Capias	5	4
Bond of defendant for appearance	6	4
Demurrer of defendant	7	5
Joinder on demurrer	8	6
Order filing opinion and overruling demurrer	9	6
Opinion	10	7
Order setting case for trial	48	33
Order entering plea of not guilty and calling for jury	48	34
Verdict of guilty	49	34
Judgment	49	34
Order allowing petition for writ of error	50	34
Petition for writ of error	51	35
Assignment of errors	51	35
Writ of error (copy)	54	37
Bond	55	38
Order filing bill of exceptions	56	39

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 13, 1907.

	Original.	Print.
Bill of exceptions	57	39
Agreement as to facts	58	39
Testimony of O. B. Coppage	58	39
Testimony of J. H. Frank	68	46
Instructions asked by defendant	71	48
Charge of the court	72	48
Exceptions to charge	75	50
Verdict	75	51
Motion in arrest of judgment	76	51
Judgment	76	51
Motion for a new trial	77	52
Judge's certificate to bill of exceptions	78	52
Citation (copy)	78	53
Clerk's certificate	80	53

1 *Transcript of Record.*

Proceedings of the District Court of the United States Court for the Eastern District of Kentucky, at a regular term begun and held at the Federal Court Hall, in the City of Covington, on Monday April 1st, A. D. 1907.

Present: Honorable A. M. J. Cochran, Judge.

No. 3311.

THE UNITED STATES OF AMERICA
vs.
WILLIAM ADAIR.

Be it remembered that heretofore to-wit, on the 17th day of October A. D. 1906, came the grand jurors of the United States of America for the Eastern District of Kentucky, and returned in court the following indictment, to-wit:

THE UNITED STATES OF AMERICA
vs.
WILLIAM ADAIR.

Indictment.

A True Bill.

W. L. GAULT, *Foreman.*

The Indictment above referred to is as follows

THE UNITED STATES OF AMERICA,
Eastern District of Kentucky, ss:

In the District Court of the United States in and for the said Eastern District of Kentucky, at its October Term, 1906, Held at Covington, Kentucky.

2 The Grand Jurors of the United States, impaneled, sworn and charged to inquire in and for the said Eastern District of Kentucky, upon their oaths present, that at and before the time hereinafter named the Louisville and Nashville Railroad Company is and was a Railroad corporation, duly organized and existing by law and a common carrier engaged in the transportation of passengers and property wholly by steam railroad for a continuous carriage and shipment from one state of the United States to another state of the United States of America, that is to say from the state of Kentucky into the state of Ohio, Indiana and Tennessee and from the state of Ohio into the state of Kentucky, and was at all times

aforesaid and at the time of the commission of the offense hereinafter named, a common carrier of interstate commerce, and an employer, subject to the provisions of a certain act of Congress of the United States of America, entitled, "An Act concerning carriers engaged in interstate commerce and their employees," approved June 1st, 1898, and said corporation was not at any time a Street Railroad corporation.

That before and at the time of the commission of the offense hereinafter named one William Adair was an agent and employee, of said common carrier and employer, and was at all said times master mechanic of said common carrier and employer in the district aforesaid, and before and at the time hereinafter stated, one O. B. Coppage was an employee of said common carrier and employer in the district aforesaid, and as such employee was at all times hereinafter named actually engaged in the capacity of locomotive fireman in train operation, and train service for said common carrier and employer in the transportation of passengers and property aforesaid, and was an employee of said common carrier and employer actually engaged in said railroad transportation and train service aforesaid, to whom the provisions of said act applied, and at the time of the commission of the offense hereinafter named, said

3 O. B. Coppage was a member of a certain Labor organization, known as the Order of Locomotive Firemen, as he the said William Adair then and there well knew, a more particular description of said organization, and the members thereof is to the grand jurors unknown.

And the grand jurors aforesaid, upon their oaths aforesaid do further present, that said William Adair agent and employee of said common carrier and employer as aforesaid, in the district aforesaid, on and before the 15th day of October, 1906, did unlawfully and unjustly discriminate against said O. B. Coppage, employee as aforesaid, by then and there discharging said O. B. Coppage from such employment of said common carrier and employer, because of his membership in said labor organization, and thereby did unjustly discriminate against an employee of a common carrier and employer engaged in interstate commerce because of his membership in a labor organization. Contrary to the forms of the statute in such cases made and provided, and against the peace and dignity of the United States.

2nd Count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that at and before the time hereinafter named the Louisville & Nashville Railroad Company is and was a railroad corporation, duly organized and existing by law and a common carrier engaged in the transportation of passengers and property wholly by steam railroad for a continuous carriage and shipment from one state of the United States to another state of the United States of America, that is to say, from the state of Kentucky into the state of Ohio, Indiana and Tennessee and from the state of Ohio into the state of Kentucky, and was at all times aforesaid and at the time

of the commission of the offense hereinafter named, a common carrier of interstate commerce, and employer, subject to the provisions of an act of Congress of the United States of America, entitled, "An Act concerning carriers engaged in interstate commerce and their employees," approved June 1st, 1898, and said corporation was not at any time a street railroad corporation.

4 That before and at the time of the commission of the offense hereinafter named one William Adair was an agent and employee of said common carrier and employer and was at all said times Master Mechanic of said common carrier and employer in the district aforesaid, and before and at the time hereinafter stated, one O. B. Coppage was an employee of said common carrier and employer in the district aforesaid, and as such employee was at all times hereinafter named actually engaged in the capacity of Locomotive fireman in train operation and train service for said common carrier and employer in the transportation of passengers and property aforesaid, and was an employee of said common carrier and employer engaged in said railroad transportation and train service aforesaid, to whom the provisions of said act applied, and at the time of the commission of the offense hereinafter named, said O. B. Coppage was a member of a certain Labor organization known as the Order of Locomotive Firemen, as he the said William Adair then and there well knew, a more particular description of said organization, and the members thereof is to the grand jury unknown.

And the grand jurors aforesaid, upon their oaths aforesaid do further present, that said William Adair, in the District aforesaid and within the jurisdiction of this court, agent and employee of said common carrier and employer aforesaid, on and before the 15th day of October, 1906, did unlawfully threaten said O. B. Coppage employee as aforesaid with loss of employment, because of his membership in said labor organization, contrary to the forms of the statute in such cases made and provided, and against the peace and dignity of the United States.

J. H. TINSLEY,
U. S. Attorney.

5 And on a day following to-wit on October 19th, A. D. 1906 an order was made and entered herein, same being in words and figures as follows, to-wit:

Order.

This cause coming on to be heard, came the U. S. Attorney, and on his motion the Court being advised, it is now ordered that this case be and the same is continued. It is further ordered that a Capias do issue for the said William Adair, returnable to the 1st day of the next April term, sitting at Covington, Kentucky, and said Capias to be endorsed, "The defendant to give bail for his appearance in the sum of $500.00 with good and sufficient surety in like amount."

And on a day following, to-wit on October 25th, A. D. 1906, the Capias mentioned in the foregoing order was issued, same being in words and figures as follows to-wit:

The President of the United States of America to the Marshal of the Eastern District of Kentucky, Greeting:

You are hereby commanded that you take William Adair, if he shall be found in your District, and him safely keep, so that you may have his body before the District Court of the United States of America for the Eastern District of Kentucky, to be held at Covington, in the said District, before the Judge of said Court, on the first day of our next April Term, the 1st day of April next, to answer unto the United States of America upon an indictment for unlawfully and unjustly discriminating against O. B. Coppage in violation of the Inter State Commerce law, and have you then there this Writ.

Witness, the Honorable A. M. J. Cochran, Judge of the United States District Court for the Eastern District of Kentucky, at Covington, in said District this 25th day of October in the year
6 of our Lord 1906 and of our Independence the 131".

JOS. C. FINNELL,
D. C. C. E. K. D.,
By J. W. MENZIES, *D. C.*

The defendant may give bail for his appearance with good and sufficient surety, in the penalty of $500.00: that is to say $500.00 for the principal and $500.00 for the surety.

Attest:

JOS. C. FINNELL,
D. C. C. E. K. D.,
By J. W. MENZIES, *D. C.*

And on a day following, to-wit October 25th, A. D. 1906, a Bond was executed and filed herein, same being in words and figures as follows, to-wit:

Bond.

THE UNITED STATES OF AMERICA,
Eastern District of Kentucky, ss:

Be it remembered, that on this 25th day of October, A. D. 1906, before me Jos. C. Finnell, Clerk of the United States District Court, within and for the district aforesaid, duly appointed as such by the said court, personally came William Adair as principal and J. L. Brady as sure*ties*, and jointly and severally acknowledge themselves to owe the United States of America in the sum of Five Hundred Dollars, to be levied on their goods and chattels, lands and tenements, if default be made in the condition following, to-wit:

The condition of this recognizance is such, that if the said William Adair shall personally appear before the District Court of the United

States, in and for the District aforesaid, at Covington, Kentucky, Monday April 1st 1907, and then and there to answer unto an indictment pending therein for violation of the laws of the United States, relating to Interstate Commerce, and then and there abide the further order of said court, and not depart without leave thereof,
7 then this recognizance to be void; otherwise remain in full force and virtue.

WILLIAM ADAIR. [SEAL.]
JNO. L. BRADY. [SEAL.]

Taken and acknowledged before me on the day and year first written above.

JOS. C. FINNELL,
Clerk U. S. District Court
Eastern District of Kentucky.
J. W. MENZIES, *D. C.*

THE UNITED STATES OF AMERICA,
Eastern District of Kentucky, ss:

I, J. L. Brady one of the sureties above named, do solemnly swear that after paying my just debts and liabilities, I am worth One Thousand Dollars in real estate in my own name, situate in the County of Kenton, in said District.

JNO. L. BRADY.

Sworn to before me the 25th day of October 1906.

JOS. C. FINNELL,
Clerk U. S. District Court
Eastern District of Ky.
J. H. MENZIES, *D. C.*

And on a day following, to-wit, November 2nd, A. D. 1906, a Demurrer was filed herein, same being in words and figures as follows, to-wit:

In the District Court of the United States for the Eastern District of Kentucky.

No. 3311.

UNITED STATES
vs.
WILLIAM ADAIR.

Demurrer of Defendant.

And now comes the defendant, William Adair, in his own
8 proper person into court, and having heard the said indictment read says that the said indictment and the matters therein contained, in the manner and form as the same are above

stated and set forth, and in the first and second counts thereof, are not sufficient in law, and that he, the defendant, William Adair, is not bound by the law of the land to answer the same, and this he is ready to verify.

Wherefore, for want of sufficient indictment in this behalf the said defendant, William Adair, prays judgment and that by the court he may be dismissed and discharged from the said premises in the said indictment specified.

H. L. STONE,
S. D. ROUSE,
BENJAMIN D. WARFIELD,
Attorneys for Defendant.

And on a day following, to-wit, November 6th, A. D. 1906 A Joinder on Demurrer was filed herein, same being in words and figures as follows, to-wit:

United States District Court, Eastern District of Kentucky.

UNITED STATES
vs.
WILLIAM ADAIR.

Joinder on Demurrer.

And J. H. Tinsley, U. S. Attorney for the Eastern District of Kentucky, who prosecutes in behalf of the United States of America, says that the said Indictment and the matters therein contained in manner and form as the same are therein stated and set forth are sufficient in law to compel the said William Adair to answer the same, and the said J. H. Tinsley, who prosecutes as aforesaid, is ready to verify and prove the same as the Court here shall direct and award.

J. H. TINSLEY,
U. S. Attorney.

9 And on a day following, to-wit April 1st, A. D. 1907, an order was made and entered herein, same being in words and figures as follows, to-wit:

Order.

This cause coming on to be heard upon the demurrer to the indictment, was fully argued, and the Court now being advised, files its written opinion and it is ordered and adjudged that said demurrer be and same is overruled, to which ruling of the Court, defendant by his attorney comes and excepts.

10 And on the same day to-wit, April 1st A. D. 1907, the opinion mentioned in the foregoing order was filed herein, same being in words and figures as follows:

Opinion.

This case is before me on demurrer to the indictment. It was found under §10 of the Act of June 1" 1898 c. 370 (30 Stat. 424) entitled

"An Act concerning carriers engaged in interstate commerce and their employees."

That section is in these words:

"That any employer subject to the provisions of this act and any officer, agent or receiver of such employer who shall require any employee, or any person seeking employment, as a condition of such employment, to enter into an agreement either written or verbal, not to become or remain a member of any labor corporation, association or organization, or shall threaten any employee with loss of employment, or shall unjustly discriminate against any employee because of his membership in such a labor corporation, association or organization; or who shall require any employee or any person seeking employment, as a condition of such employment, to enter into a contract whereby such employee or applicant for employment shall agree to contribute to any fund for charitable, social or beneficial purposes; to release such employee from legal liability for any personal injury by reason of any benefit received from such fund beyond the proportion of the benefit arising from the employee's contribution to such fund; or who shall, after having discharged an employee attempt to conspire to prevent such employee from obtaining employment, or who shall after the quitting of an employee attempt to conspire to prevent such employee from obtaining employment, is hereby declared to be guilty of a misdemeanor and upon conviction thereof in any court of the United States of competent jurisdiction in the district in which such offense was committed, shall be punished for each offense by a fine of not less than one hundred dollars and not more than one thousand dollars.

The ground of the demurrer is that this section of that act is unconstitutional. In order to appreciate the particulars in which it is claimed that it is unconstitutional, it is necessary to understand that section and the act of which it is a part.

The act contains twelve sections. The twelfth section repeals a previous act approved October 1" 1888 (25 Stat. 501) entitled:

An act to create boards of arbitration or commission for settling controversies and differences between railroad corporations and other common carriers engaged in interstate and territorial transportation of property or passengers and their employees."

11 The commission which as one of its features, it provided for, composed of three members two appointed by the President and the other, the Commissioner of Labor, was authorized to examine the causes of the controversies and differences referred to in the title, the conditions accompanying them, and the best means for adjusting them, and required to report the result of their examination to the President and Congress. It is stated in one of the briefs filed on behalf of the United States, that this act was the result of disturb

ances growing out of a controversy, or controversies, between railroad companies and interstate commerce and their employees. I have no means of verifying this statement.

After the great railroad strike at Chicago in June-July 1894, a Commission created under said act examined the causes thereof. It reported the result of its examination to the President November 14, 1894, who transmitted it to Congress December 10, 1894. December 18, 1894, a bill drawn by two of the members of the commission, at the request of the Committee on Labor and in line with the recommendations of their report, was introduced in the House (H. R. 8259, 53 Cong. 3d Sess.) January 17, 1895. Another bill covering the same general subject, approved by the Attorney General, was likewise introduced in the House (H. R. 8556 53d Cong. 3d Sess.) and subsequently passed by it. It failed to pass the senate. The House in the fifty-fourth Congress passed a like bill (H. R. 268) which failed to pass the Senate. Similar bills were introduced at the first session of the fifty-fifth Congress (S. 122, 1014; H. R. 61) and again at the second session thereof (S. 3662; H. R. 4372) and then enacted into said act of June 1, 1889.

That act, therefore, may be said to be an outgrowth of said Chicago strike. In the reports made to the Senate and House it is characterized and treated as a voluntary arbitration bill. As to the need for the bill the Senate Committee on Education and Labor,
12 which reported it to the Senate, said:

"The necessity for the bill arises from the calamitous results in the way of ill-considered strikes arising from the tyranny of capital or unjust demands of labor organizations, whereby the business of the country is brought to a stand still and the thousands of employees, with their helpless wives and children are confronted with starvation."

The House Committee on Labor which reported it to the House said:

"Persons engaged in interstate commerce who are most affected by the bill under consideration, have been anxious to secure the enactment into law of such measure as would operate justly and effectively put an end to industrial wars that have resulted from disputes growing out of the questions of wages, hours of labor and the condition of employment between the employer and the employee."

The act, however, is something more than a mere voluntary arbitration measure. That may be said to be its principal feature, but it has other features of which §10 in question herein is one. By §1 it is provided "that this act shall apply to any common carrier or carriers, and their officers, agents and employés except masters of vessels and seamen, as defined in §4612, Revised Statutes of the United States, engaged in the transportation of passengers or property, wholly by railroad or partly by railroad and partly by water, for a continuous carriage or shipment, from one state or territory *to* the United States, or the District of Columbia, to any other state or territory of the United States, or the District of Columbia, or *for* any place in the United States, to an adjacent foreign country, or

from any place in the United States through a foreign country to any other place in the United States."

Section 2 to 7 inclusive and §11 relate to the arbitration feature of the act. The contingency which it is provided is to put it in operation is, "whenever a controversy concerning wages, hours of labor, or conditions of employment shall arise between a carrier subject to this act, and the employees of such carriers seriously interrupting, or threatening to interrupt the business of said carrier;" and the arbitration is to be brought about by the endeavor of the chairman of the Interstate Commerce Commission and the
13 Commissioner of Labor upon their failure, at the request of either party to the controversy, to amicably settle it by mediation and conciliation, in getting both parties to sign articles of submission to arbitration and choosing two of the three arbitrators. It is provided that in signing the articles of submission and in choosing one of said two arbitrators, the employee- of the carrier involved in the controversy shall be represented by the labor organization to which they belong, except where the majority of them do not belong to any such organization, in which case they shall be represented by a committee chosen by them and that after an award has been made it shall not be lawful for such organization to order, counsel or advise any of said employés to quit the service of their employer for three months thereafter without just cause, without giving to said employer thirty days' written notice of an intent so to do.

The other features of the act are contained in §8, 9 and 10.

By §8 it is provided that in every incorporation under the provisions of Chapter 567, 25 Stat. 86, entitled "An act to legalize the incorporation of National Trade Unions," it must be provided in the articles of incorporation and in the constitution rules and bylaws that a member should cease to be such by participating in or by instigating force or violence against persons or property during strikes, lockouts, or boycotts, or by se-king to prevent others from working through violence, threats or intimidations—that members of such incorporations should not be personally liable for the acts, debts or obligations of the corporation, nor should such corporation be liable for the acts of members or others in violation of law, and that such corporations might appear by designated representatives before the board created by the act, or in any suits or proceedings for or against any such corporations or their members, in any of the federal courts.

By §9 it is provided that whenever receivers appointed by federal courts are in the possession and control of railroads, the
14 employees thereon shall have the right through the officers and representatives of their associations, whether incorporated or not, to be heard upon all questions affecting the terms and conditions of their employment, and that no reduction of wages shall be made by such receivers without authority of the court therefor upon notice to such employees.

Section 10, under which the indictment herein was found has heretofore been quoted in full. It makes it a criminal offense, punishable by fine, for any employing common carrier subject to the

provisions of the act, and any officer, agent or receiver thereof, to do either one of four separate things, to wit:

(1.) Require any employee or any person seeking employment, as a condition of employment, to enter into an agreement not to become or remain a member of any labor corporation, association or organization.

(2.) Threaten any employee with loss of employment or unjustly discriminate against any employee because of his membership in such a labor corporation, association or organization.

(3.) Require any employee or person seeking employment, as a condition of employment, to enter into a contract whereby he shall agree to contribute to any fund for charitable, social or beneficial purposes, and to release such employee from legal liability for any personal injury by reason of any benefit received from such fund beyond the proportion of the benefit arising from the employee's contribution to such fund.

(4.) Attempt or conspire, after having discharged an employee, or after his quitting, to prevent him from obtaining employment.

These four separate features of this act, to wit, arbitration, forfeiture of membership, hearing by the court and employing common carrier's conduct, have more than a mere formal unity, *i. e.,* union in one and the same act. They have a real unity—an organizing idea that makes them parts of a real whole. That idea is a common purpose, and that common purpose is avoidance of an interruption to interstate commerce arising from a resort by employees to strikes, lockouts or boycotts, to redress their real or fancied wrongs.

We are driven to this conclusion by a consideration of the provisions of the act in the light of its history.

The provision made in the first and third features of the act to avoid such an interruption is a settlement of the controversy between the antagonistic parties, in the former, by either the mediation and conciliation of the two chairmen, or the submission to arbitration and award pursuant thereto, and in the latter by the decision of the federal court, if the railroad is in the hands of its receiver. That made in the last feature is by penalization of certain conduct of the employing common carrier calculated more or less to provoke a controversy between it and its employees which might result in a strike, lockout or boycott. And that made in the second feature is forfeiture of membership in such Trade Unions by employees participating in or instigating force, violence, threats or intimidation during strikes, lockouts or boycotts. The forfeiture provided for is for participating in or instigating force, violence, threats of intimidation during strikes, lockouts or boycotts, and not for participating in or instigating strikes, lockouts or boycotts. This feature, therefore, makes no provision for an avoidance or interruption to interstate commerce by strikes, lockouts or boycotts, but only for an avoidance of such interruption by force, violence, threats and intimidation during strikes, lockouts and boycotts.

Possibly some favoritism towards the employee can be found in the act. It attaches no hurtful consequences to the employee under

any consideration, for engaging in a strike, lockout or boycott. Possibly the power to attach such consequences was quite limited. There would seem however, to be no reason why forfeiture of membership could not have been based on a participation in or instigation of a strike, lockout or boycott, as well as on a participation in or instigation of force, violence, threats or intimidation during a strike.

16

Possibly also this forfeiture of membership feature and the penalization of certain of the conduct of the employing common carriers, would have but little effect in preventing a strike lockout or boycott. Yet it cannot be said that they would not have some effect.

This idea therefore, of avoiding an interruption to interstate commerce, pervades the whole act and pervades §10.

The indictment contains two counts. In each it is alleged that at the time of the commission of the offense charged the defendant Wm. Adair, was master mechanic of the Louisville and Nashville Railroad Company, a common carrier engaged in interstate commerce, and one O. B. Coppage, a member of the Order of Locomotive Firemen, a labor organization, was in its employ as a locomotive fireman. The offense charged in the first count is that the defendant unjustly discriminated against said Coppage because of his membership in said order, by discharging him from said employment on that ground. That charged in the second count is that defendant threatened said Coppage with loss of employment because of his membership in said order.

It is claimed that said section is unconstitutional for several reasons. The first one is that no warrant for its enactment is to be found in the federal constitution. It is denied that it is within Subsection 3, §8, Article 1, conferring on Congress power "to regulate commerce with foreign nations and among the several states and with the Indian tribes," the only provision thereof which it can be claimed justifies it. Is this denial sound?

The question whether any given legislation by Congress is within this provision hangs upon two others. What is it that Congress is thereby empowered to regulate? And what is to regulate it? It is empowered to regulate nothing else and to do nothing else to it than to regulate it.

17

In considering what it is Congress is thereby empowered to regulate, I will, for convenience sake, limit myself to commerce among the several states, or interstate commerce.

Interstate commerce, though perhaps not limited thereto includes interstate intercourse. We are concerned here with no more. Interstate intercourse is the passage of property, persons or messages, from within one state to within another state. It has certain adjuncts, to wit, the persons corporate or natural and their employees effectuating the passage, the means by which they effectuate it, including the ways, artificial of natural, over which, and the instrumentalities by which the passage is made, and the charges made for the service rendered. Strictly speaking these things are not interstate intercourse or commerce. They are merely the adjuncts

thereof. Congress however, is empowered by said provision to regulate the adjuncts of interstate commerce as much so as interstate commerce itself. Its power to regulate them is as extensive, full and complete as its power to regulate it. The rationale or Juridical explanation of this may be debatable. It may be because within the meaning of said provision, the adjuncts of such commerce are parts thereof, or because to regulate the adjuncts thereof is to regulate it, or because power to regulate the former is granted by necessary implication—to regulate the latter being all that is expressly granted. Or if may be that the power to regulate the adjuncts of interstate commerce is dependent somewhat on the last subsection of said §8, Article 1, which confers on Congress power to pass laws necessary and proper to carry into execution the powers conferred by the other and preceding sections thereof. But as to the existence of power to regulate the adjuncts of interstate commerce, and as to the extent thereof being as stated, there can be no question.

What I have said as to the nature of interstate commerce and its adjuncts, is not put forward as exhaustive or exactly accurate. The matter has not been sufficiently reflected upon for me to be
18 absolutely sure of my ground. It is put forward simply as a working basis, and is deemed sufficient for that purpose. It is a deduction from the relevant decisions of the Supreme Court of the United States. I will not however, pause to make this good.

What is it then to regulate interstate commerce and its adjuncts? This question requires a more extended consideration as it is here that it is claimed on behalf of defendant that said section breaks down. It is urged that the power to regulate, conferred by said provision of the federal constitution, is a power to regulate directly and substantially, and not indirectly, remotely, incidentally or collaterally, and that said section in so far as it is a regulation at all, is an indirect and not a direct one, and hence not within such power. Two lines of decisions of the Supreme Court of the United States are relied on in support of both these positions, *i. e.,* as to the nature of said power and as to the nature of the legislation embodied in said section.

One line consists of decisions in cases in which the application of the Anti Trust Act of July 2, 1890, was involved, and divides itself into two classes,—those where it was held that it did not apply, and those where it was held that it did. Cases of the former class are the following, to wit:

United States *v.* E. C. Knight Co., 156 U. S. 1.
Hopkins *v.* United States 171 U. S. 578.
Anderson *v.* United States, 171 U. S. 604.

Cases of the latter class are the following, to wit:

United States *v.* Trans. Missouri Freight Association, 166 U. S. 279.
United States *v.* Joint Traffice Association 171 U. S. 505.
Addyston Pipe & Steel Co. *v.* United States 175 U. S. 211.
Northern Securities Co. *v.* United States 193 U. S. 197.
Swift & Co. *v.* United States 196 U. S. 375.

The other line consists of decisions to the effect that certain state legislation was not an encroachment on the commercial power
19 of Congress and hence was valid. Amongst the cases cited containing such decisions, are the following, to wit:

Sherlock *v.* Alling, 93 U. S. 102.
Escanaba Co. *v.* Chicago 107 U. S. 678.
Smith *v.* Alabama 124 U. S. 465.
Kidd *v.* Pearson, 128 U. S. 1.
Nashville &c. Ry. Co. *v.* Alabama, 128 U. S. 96.
Hennington *v.* Georgia 163 U. S. 299.
C. M. & St. P. Ry. Co. *v.* Solan, 169 U. S. 133.
Williams *v.* Fears, 179 U. S. 270.

I cannot accede to the correctness of either position *i. e.,* as to the nature of said power or as to the nature of said legislation, or that either finds support in either one of these lines of decisions.

The position as to the nature of the power conferred on Congress by said constitutional provision interpolates therein the qualifying word "directly." The power conferred thereby is "to regulate" without limitation and not "to regulate directly." The courts have no right to limit a constitutional provision by inserting a qualifying word therein. They must take it as they find it. If then there is such a thing as an indirect regulation of interstate commerce, or its adjuncts—if indeed all regulation is not in its very nature direct—it is hard to conceive why it is not covered by the power conferred. In the case of *Gibbons v. Ogden, 9 Wheat. 1,* Mr. Chief Justice Marshall said:

"This power like all others vested in Congress is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution."

The correct definition of the power, as it seems to me, is that it is the power to enact legislation that *directly affects* interstate commerce or its adjuncts, and not legislation that *affects* it or them *indirectly* only. Or it may be put this way. It is the power to enact legislation which relates to, acts upon or touches interstate commerce or its adjuncts or legislation of which either is the subject. Such legislation affects them directly. Legislation which does not relate to, act upon or touch them, or of which they are not
20 the subject can only affect them indirectly.

No support of the position of defendant's counsel as to the nature of the power in question can be found in either of the two lines of decisions relied on by them. So far as they throw light on the subject they bear out the statement as to the nature thereof, which I have put forward. The last line throws less light on it than the first. This is to be expected as it has to do with state legislation, whereas the other has to do with congressional legislation. Indeed, the decisions in the Sherlock, Escanaba Company, Smith, Nashville &c. Railway Company, Hennington and Solan cases, and certain expressions in the opinion in some of them may mislead one as to the nature of that power or the subject of it, if he is not careful. The

legislation involved in those cases and held valid was as follows, to wit:

In the Sherlock case, the Indiana wrongful death statute in its applicability to owners of steamboats engaged in interstate commerce; in the Escanabe Company case, the Chicago bridge ordinance providing that the draws in the bridge across Chicago river should be closed at certain times in the day and not kept open longer than ten minutes at other times; in the Smith case, the Alabama statute requiring locomotive engineers to be examined and licensed in its applicability to such engineers engaged in interstate commerce; in the Nashville &c. Railway Company case, the Alabama statute prohibiting employment in certain capacities by railroad companies of persons afflicted with color blindness, in its applicability to such companies when engaged in interstate commerce; in the Hennington case, the Georgia statute prohibiting the operation of railway trains on Sunday in its applicability to such as were so engaged; and in the Solan case, the Iowa statute prohibiting contracts by railroad companies to exempt them from liability as a common carrier in its applicability to such companies when so engaged.

These decisions may mislead one as to the nature of said power or the subject of it, in that if he does not duly consider them he may think that it follows from the fact that it has been held
21 thereby that a state legislature has power to enact such legislation, that Congress has no power to enact similar legislation. He will naturally so think if he has the idea that in no state of case can a state legislature enter the field of interstate commerce or its adjuncts—that so far as that field can be so occupied at all by legislation it can only be occupied by congressional legislation, and, properly so, if such idea is correct. For if in no state of case can a state legislature enter such field, a decision that particular legislation enacted by it is valid, necessarily means that it does not by its enactment enter it, and if by its enactment it does not enter that field, Congress by the enactment of similar legislation would not enter it either, and hence its action would be beyond its power. But that idea is not correct. It is not true that in no state of case can a state legislature enter the field of interstate commerce or its adjuncts.

The commercial provision of the federal constitution does not in terms exclude the several states from the field of interstate commerce and its adjuncts. It simply confers on Congress power to enter it. If they are excluded therefrom it can only be as an inference from the grant of power to Congress to enter it. It is held that this is a proper inference therefrom and that the power of Congress to enter that field is exclusive. But it does not follow from this that a state legislature can in no state of case enter it. It simply follows therefrom that a state legislature cannot enter it without the consent of Congress. In the matter of consent it is not necessary that it be expressly or affirmatively given. It may be given by mere silence or, as it is frequently put, by non or inaction. One of the most difficult problems that the Supreme Court of the United States in its history

has had to deal with, has been the question as to when such consent is to be implied and when it is not. It has often been referred to in the opinions of that court as difficult and perplexing, and has frequently caused dissent amongst Justices thereof. The Court has always refused to lay down any single and exact rule of decision
22 applicable to all cases that might arise. It lies outside of my path to make any reference to the considerations that have been referred to as having a bearing on the solution of the problem. The outcome of the presentation of the problem to that court has been two lines of decisions. One consists of cases where it has been held that such consent is not to be implied. It begins with the case of

Gibbons v. Ogden, 9 Wheat. 1.

The other consists of cases where it is held that it is to be implied. It begins with the case of

Wilson v. Blackbird Creek Marsh Co., 2 Pet. 245.

It is to this latter line of decisions that the Sherlock and other cases just considered belong. It embraces many others. That the implied consent of Congress to the enactment of such legislation by a state legislature is the determining factor in the matter of its validity, is not brought out in the earlier cases. It is only later that it appears that such is the case.

Such consent, when it is implied, is temporary only. It may be withdrawn at any time. Congress, whenever it sees fit to do so, may enter the field in that particular by the enactment of similar legislation. If it does so it thereby ousts the state legislation. This is recognized in each of the cases referred to above.

In the *Sherlock* case Mr. Justice Field said:

"Until Congress therefore, makes some regulation touching the liability of parties for marine torts resulting in the death of the persons injured, we are of the opinion that the statute of Indiana applies giving a right of action in such cases to the personal representative of the deceased and that, as thus applied it constitutes no encroachment upon the commercial power of Congress."

In the *Escanaba Company* case Mr. Justice Field said:

"But until Congress acts on the subject the power of the state over bridges across its navigable streams is plenary."
23 And again:

"It is therefore, a matter of good sense and practical wisdom to leave their control and management with the states, Congress having the power at all times to interfere and supersede their authority whenever they act arbitrarily and to the injury of commerce."

In the *Smith* case Mr. Justice Matthews said:

"The statute of Alabama, the validity of which is drawn in question in this case, does not fall within this exception. It would indeed be competent for Congress to legislate upon its subject matter & to prescribe the qualifications of locomotive engineers for employ-

ment by carriers engaged in foreign or interstate commerce. It has legislated upon a similar subject by prescribing the qualifications for pilots and engineers of steam vessels engaged in the coasting trade and navigating the inland waters of the United States while engaged in commerce among the states; and such legislation in undoubtedly justified on the ground that it is incident to the power to regulate interstate commerce."

In the *Nashville &c. Railway Company* case Mr. Justice Field said:

"It is conceded that the power of Congress to regulate interstate commerce is plenary; that, as incident to it, Congress may legislate as to the qualifications, duties and liabilities of employés and others on railway trains engaged in that commerce; and that such legislation will supersede any state action on the subject. But until such legislation is had, it is clearly within the competency of the states to provide against accidents on trains whilst within their limits."

In the *Hennington* case Mr. Justice Harlan said:

"The argument on behalf of the defendant rests upon the erroneous assumption that the statute of Georgia is such a regulation of interstate commerce as is forbidden by the Constitution, without reference to affirmative action by Congress, and not merely a statute enacted by the state under its police power, and which, although in some degree affecting interstate commerce, does not go beyond the necessities of the case, and therefore is valid, at least until Congress interferes."

And again:

"The legislative enactments of the states passed under their admitted police powers, and having a real relation to the domestic peace, order, health, and safety of their people, but which by their necessary operation affect to some extent or for a limited time, the conduct of commerce among the states, are yet not invalid by force alone of the grant of power to Congress to regulate such commerce, and, if not obnoxious to some other constitutional provision or destruction of some right secured by the fundamental law, are to be respected by the courts of the Union until they are superseded and displaced by some act of Congress passed in execution of the power granted to it by the constitution."

24 In the *Solan* case Mr. Justice Gray said:

"The rules prescribed for the construction of railroads and for their management and operation designed to protect persons and property otherwise endangered by their use, are strictly within the scope of the local law. They are not in themselves regulations of interstate commerce, although they control, in some degree, the conduct and the liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are to be regarded as legislation in and of such commerce and as a rightful exercise of the police power of the state to regulate the relative rights and duties of all persons and corporations within its limits."

In the case of *N. Y. N. H. & H. R. R. Co. v. New York, 165 U. S. 628,* belonging to the same line of decisions as the foregoing

but not cited by defendant's counsel, in which the New York statute forbidding the heating of passenger cars in that state by stoves or furnaces kept inside the cars or suspended therefrom, was held valid in its applicability to cars engaged in interstate commerce, Mr. Justice Harlan said:

"Nor is it within the meaning of the constitution a regulation of commerce, although it controls in some degree the conduct of those engaged in such commerce. So far as it may affect interstate commerce, it is to be regarded as legislation in aid of commerce and enacted under the power remaining with the State to regulate the relative rights and duties of all persons and corporations within its limits. Until displaced by such national legislation as Congress might rightfully establish under its power to regulate commerce with foreign nations and among the several states, the validity of the statute, so far as the commerce clause of the Constitution of the United States is concerned, cannot be questioned."

As to the theory on which a state has power to tax the property of an interstate commerce adjunct of interstate commerce, I have not considered the matter sufficiently to express an opinion and it is not necessary here that I do so. It *is* does not follow then from the decisions in those cases, that Congress has no power to enact similar legislation to that involved therein. On the contrary it follows therefrom,—the validity thereof depending on the implied consent of Congress,—that it has power to enact similar legislation. And this is expressly recognized in the quotations I have made from the opinions embodying those decisions. Viewed in this light these decisions instead of misleading one as to the nature of said power or its subject, will be helpful in enabling one to arrive at a true notion in regard thereto.

Then as to the expressions in some of said opinions which may mislead one. I have in mind such expression as that in the quotation made from the opinion of Mr. Justice Gray in the *Solan* case, contained in these words, to wit:

"They are not in themselves regulations of interstate commerce."

And as that in the quotation from the opinion of Mr. Justice Harlan in the *N. Y., N. H. & H. R. R. Company* case contained in these words, to wit:

"Nor is it within the meaning of the constitution a regulation of commerce, although it controls in some degree the conduct of those engaged in such commerce."

Substantially similar expressions may be found in the opinion of Mr. Justice Matthews in the *Smith* case, in these words to wit:

"But the provisions on the subject contained in the statute of Alabama under consideration, are not regulations of interstate commerce. It is a misnomer to call them such."

And again:

"They are not *per se* regulations of such commerce; it is only when they operate as such in the circumstances of their application and conflict with the expressed or presumed will of Congress enacted on the subject that they can be required to give way to the supreme authority of the constitution."

And in the opinion of Mr. Justice Harlan in the Hennington case, where he speaks of such local laws not being "within the meaning of the constitution and considered in their own nature regulations of interstate commerce, simply because for a limited time, or to a limited extent, they cover the field occupied by those engaged in such commerce."

Such expressions cannot be construed to mean that such legislation, if enacted by Congress, as to interstate commerce or its adjuncts, would not be regulations thereof. Congress would not
26 have power to enact them unless they were. The fact that Congress has power to so enact them, according to the conclusion heretofore reached, settles the fact that they would be such regulations if so enacted.

We are now in position to appreciate the value of the decisions which we have been considering *in extenso* in their bearing on the nature of the commercial power of Congress. The legislation involved therein if enacted by Congress as to interstate commerce and its adjuncts, would affect them directly. It would relate thereto, act upon and touch it and such would be the subject thereof. And it follows that the nature of that power is to enact legislation that will do and be this.

The other two decisions belonging to said second line cited and relied on by defendant's counsel, tend in the same direction. They are the decisions in the *Kidd* and *Williams* cases. There the state legislation involved was held valid not because of any implied consent by Congress to its enactment, but because the enactment of such legislation was not an entry within the field of interstate commerce or its adjuncts.

In the *Kidd* case the legislation involved was the Iowa statute prohibiting the manufacture and sale of intoxicating liquors in that state; and in the *Williams* case the legislation involved was the Georgia statute imposing a tax on emigrant agents, that is, persons hiring others in that state to labor in other states. In neither case did the statute affect interstate commerce or its adjuncts directly, or relate thereto or act upon or touch either, or was such the subject thereof. So far as they affected either they affected it indirectly. The subject matter of each was something other than interstate commerce or its adjuncts.

We come then to the first line of decisions cited and relied on by defendant's counsel as bearing out their claim as to the nature of the commercial power of Congress and which, I think, bear out the statement which I have put forward as to the nature thereof. As they have to do with congressional legislation, it is to be expected that they will settle beyond question the true nature of that
27 power and in this we will not be disappointed.

The exact question in each of those cases was not whether Congress might enact any particular legislation under its commercial power, but whether the contract involved therein was in restraint of interstate commerce within the meaning of said Anti-Trust Act, and prohibited by it. That Act, however, depended for its validity on said power of Congress and its meaning—the kind of

contracts intended to be covered thereby—was treated in those cases as dependent on the nature of that power. It was held that it covered contracts that affected interstate commerce directly—that related thereto, acted upon and touched it and of which it was the subject, and did not cover contracts that affect it indirectly only and which did not relate thereto, act upon or touch it or of which it was not the subject.

In the *Knight* case the contract involved affected directly the manufacture of sugar in the state of Pennsylvania; it related to, acted upon and touched it, and such manufacture was the subject thereof. It affected interstate commerce indirectly only. It did not relate thereto, act upon or touch it, and such commerce was not the subject of it. It was held not within the act.

In the *Hopkins* and *Anderson* cases the contracts involved were between the members of certain live stock exchanges doing business in Kansas City, Missouri, embodied in certain rules thereof. Those contracts affected directly the buying and selling of live stock at the stock yards in said city. They did not relate to interstate commerce on live stock and affected it indirectly only. They were held to be not within the Act.

In the *Trans-Missouri Freight Association, Joint Traffic Association and Northern Securities company* cases, the contracts involved were between common carriers engaged in interstate commerce.

In the *Addyston Pipe Steel Company* case the contract in-
28 volved was between persons engaged in interstate commerce in iron pipe.

And in the *Swift and Company* case the contract involved was between persons engaged in interstate commerce in meat.

The contract in each instance affected directly the interstate commerce carried on by the parties thereto. It related to such commerce, acted upon and touched it and such commerce was the subject thereof. It was held in each instance that the contract was within the Act.

It follows from these holdings that the nature of the commercial power of congress is as I have stated it. Legislation prohibiting contracts that affect interstate commerce or its adjuncts indirectly, or which do not relate thereto, act upon or touch either, or of which such is not the subject, itself affects interstate commerce or its adjuncts indirectly, and does not relate thereto, act upon or touch them, and such is not the subject thereof. It is only legislation prohibiting contracts that affect interstate commerce or its adjuncts directly, or that relate thereto, act upon or touch either, or of which such is the subject that itself affects interstate commerce or its adjuncts directly and relates thereto, acts upon and touches them and of which such is the subject.

In the course of his opinion in the *Addyston Pipe and Steel Company* case, Mr. Justice Peckham frequently refers to contracts within said Act as those *regulating* said commerce *directly* and substantially and not those *regulating* it *indirectly*, remotely, incidentally and collaterally. It is this reference no doubt that suggested the position taken here as to the nature of said power which I have

criticised. There are, however, other references in said opinion which show that what he had in mind was the distinction between contracts and legislation that *affected* interstate commerce *directly*, and contracts and legislation that *affected* it *indirectly*, which is the correct way, as I submit, of putting the matter.

29 I have thus arrived at the conclusion as to the nature of the power in question by a generalization of the two lines of decisions cited and relied on by defendant's counsel, as upholding their view thereof. The generalization might have taken a wider scope by embracing the great number of other decisions involving the validity of state legislation claimed to be an encroachment on the commercial power of Congress not cited or relied on. But to have done so would not have changed the result and unduly lengthened this opinion.

There are not many other decisions of the Supreme Court involving the validity of congressional legislation, whose validity was dependent on that power, that can be considered in arriving at such a conclusion. Until lately legislation in any way affecting interstate commerce or its adjuncts, has been enacted principally by state legislatures. There has not been a greater amount of congressional legislation affecting that matter. It is only in recent times that it has become, to any great extent, the subject of congressional consideration and action. It is just what one would expect therefore to find that there are not many decisions of that court dealing with the validity of such legislation. Outside of those already considered, I do not deem it important to make any reference to any such decisions beyond the case of

Johnson v. Southern Pacific, 196 U. S. 1.

It involved the Safety Appliance Act of Congress of March 2, 1893, 27 Stat. 531, C. 196. The constitutionality of the Act was assumed therein. It was not attacked. The decision was occupied entirely with its construction. The Safety Appliance Act affected directly an adjunct of interstate commerce to wit, the cars engaged therein and that as to their couplers. It related thereto, acted upon and touched it and such was the subject thereof.

I am aware that the classic definition of the power in question is to be found in the words of Mr. Chief Justice Marshall, in the

30 case of Gibbons *v.* Ogden, when he said that the power to regulate commerce is the power "to prescribe the rule by which commerce is to be governed," often subsequently repeated in subsequent decisions of the Supreme Court in substantially the same words.

Mr. Justice Harlan in the case of *Champion v. Ames, 188 U. S., 321*, characterized it is a "general observation."

What I have advanced is simply the outcome of a struggle after something more definite. After the great number of decisions of that court involving state and congressional litigation affecting interstate commerce and its adjuncts, the matter ought to be capable of more definite statement. A true generalization thereof is bound to give it.

Having thus reached a conclusion as to the nature of the power in question, we come to the other position of defendant's counsel to wit, that said section is not within said power. And in disposing of it I will treat its nature as I have defined it and not as they have. Does it affect interstate commerce, or any of its adjuncts, directly; does it relate thereto, act upon or touch either, or is either the subject of it? It must be admitted that it does and that such is the case. It affects an adjunct of interstate commerce, relates thereto, acts upon and touches it, and such is the subject of it. That adjunct is common carriers engaged in interstate commerce, and their officers, agents and employés. It forbids them from doing any of the things covered by that section.

But it may be thought that it is not sufficient that congressional legislation should affect an adjunct of interstate commerce directly, relate thereto, act upon or touch it, or that it be the subject thereof in order to be valid. To this end it must serve some useful purpose in regard to interstate commerce itself, and not be intended to, and in fact, accomplish no more than some ulterior purpose. I am not prepared to say that such a view is not correct. There is
31 nothing in the Johnson case impugning its correctness. Of course the requirement as to providing couplers was and is beneficial to the manufacturers thereof and to brakemen. But it is beneficial also to interstate commerce itself. It made it more attractive for brakemen to engage therein, by lessening the danger of the business. The necessities of this case do not require that I should dispute the correctness of this view.

The section involved herein is not without a beneficial effect upon interstate commerce itself. Its tendency is to prevent an interruption to interstate commerce by reason of strikes, lockouts and boycotts and such, as I have already stat-d, was its intent.

Until recent times the national attitude towards interstate commerce has been almost solely to prevent its being burdened and interrupted. Such has been the controlling consideration in determining the validity of state legislation affecting it or its adjuncts.

In the case of *The United States v. Coombs, 12 Pet. 72,* the question involved was whether one could be indicted under the Act of Congress entitled "An Act more effectually to provide for the punishment of certain crimes against the United States and for other purposes," approved March 3, 1825, for stealing a quantity of merchandise belonging to a ship wrecked on the coast of New York, the goods at the time they were stolen being above high water mark and hence outside of the jurisdiction of the United States. It was held that he could. Mr. Justice Story said:

"It (commercial power of Congress) does not stop at the mere boundary line of a state; nor is it confined to acts done on the water, or in the necessary course of the navigation thereof. It extends to such acts done on land which interfere with, obstruct or prevent the due exercise of the power to regulate commerce and navigation with foreign nations and among the states. Any offense which thus interferes with, obstructs or prevents such commerce and navigation,

though done on land, may be punished by Congress under its general authority to make all laws necessary and proper to execute their delegated constitutional powers. No one can doubt that the various offenses enumerated in the tenth section of the Act are all of a nature which tend essentially to obstruct, prevent or destroy the due operation of commerce and navigation with foreign nations
32 and among the several states."

In the case of *In re Debs, 158 U. S. 565,* it was held that the United States through its Attorney General, had a right to bring a suit to enjoin the interruption of interstate commerce caused by the Chicago strike of 1894.

The Anti Trust Act of 1890 is another manifestation of this National attitude, and there would seem to be no room to doubt that the tenth section of the Act of June 1, 1898, involved herein, is a still further manifestation thereof.

The ground upon which it is claimed by defendant's counsel that said section does not affect directly or, as they have it, regulate directly that which is the subject of the commercial power of Congress and hence is not within it, is that "it is merely an intermeddling by Congress with the private relations between master and servant." But it does not deal with the relations between master and servant in the abstract. It deals with the relations between particular masters and servants, to-wit, common carriers engaged in interstate commerce and their employés. Such carriers and their employés are the adjuncts of such commerce. Hence said legislation affects those adjuncts directly. It relates thereto, acts upon and touches them and they are the subjects thereof. This being so, it is within that power.

I conclude, therefore, that said section is not unconstitutional for this reason.

Another reason given in support of the claim that said section is unconstitutional is, that however it may be as to its being within the commercial power of Congress, it is prohibited by the fifth amendment to the federal constitution, in so far as it provides that no person shall "be deprived of life, liberty or property without due process of law." In other words it is claimed that that portion of said amendment is a limitation upon the commercial power
33 of Congress, and though said section comes within the latter, it comes within the former also. It must be conceded that if this position is correct, then said section is unconstitutional.

Defendant's counsel cite in support of this position the following decisions of the highest courts of the stat-s of Missouri, Illinois, Wisconsin and New York, to wit:

State *v.* Julow 129 Mo. 163.
Gillespie *v.* People 188 Ill. 179.
State *v.* Kreutzburg 58 L. R. A. 748.
People *v.* Marcus 77 N. E. 1073.

In each of these cases a state statute was involved substantially similar to said tenth section, in making it an offense for an employer to discharge or refuse to employ an employee because of his member-

ship in a labor organization. In those cases they were sought to be enforced against persons engaged in private business—in the Missouri and New York cases against a manufacturer, and in the Illinois case against a contractor. It does not appear in what business the defendant was engaged in in the Wisconsin case. In each case the statute was held to be unconstitutional as in violation of certain provisions of the state constitution, and of the fourteenth amendment to the federal constitution, in so far as it prohibits state action depriving any person of life, liberty or property without due process of law.

Counsel for the United States contend that such decisions are erroneous. They maintain that such statutes do not deprive the employer of any lawful right; that they simply protect the rights of employees against invasion by the employer; and that the alleged right of the employer is a right to interfere with the liberty of his employees because they are in his service. This argument merely begs the question. No decision is cited to the contrary of those decisions, except a *nisi prius* decision in the case of *Davis v. State, 30 Ohio Law Jr., 342.*

I am not disposed to question the correctness of those decisions. On the contrary they seem to me based upon sound reasoning.

34 As said by *Cooley on Torts, 278:*

"It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim caprice, prejudice or malice. With his reasons, neither the public nor third persons have any legal concern."

But it does not follow from the correctness of these decisions that section ten is unconstitutional, though it seems quite plausible that if state legislation of this character is unconstitutional as being in violation of the fourteenth amendment prohibiting state action depriving any person of life, liberty or property without due process of law, said tenth section is unconstitutional also as being in violation of the fifth amendment prohibiting federal action depriving a person of life, liberty or property, without due process of law. The question may be thought to depend upon whether said fifth amendment is a limitation upon the commercial power of Congress conferred by subsection 8, section 3, Article 1, of the original constitution.

In the case of *Gibbons v. Ogden,* Mr. Chief Justice Marshall, in the language heretofore quoted said:

"This power, like all others vested in Congress is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution."

This language is repeated several times in subsequent cases. It would seem to imply that limitations on said power are to be found in the federal constitution. I have found nowhere any statement as to what limitations thereon are to be found therein. Nor have I taken the time to study the constitution with the view of ascertaining for myself those limitations.

But it would seem to be reasonable to hold that said amendment is a limitation on said power.

In the case of *United States v. E. C. Knight Co., 156 U. S. 1,* Mr. Justice Harlan, in his dissenting opinion said:

35 "In committing to Congress the control of commerce with foreign nations and among the several states, the constitution did not define the means that may be employed to protect the freedom of commercial intercourse and traffic established for the benefit of the people of the Union. It wisely for-bore to impose any limitations upon the exercise of that power except those arising from the general nature of the government, or such as are embodied in the fundamental guarantees of liberty and property."

It would hardly be held that it was not a limitation on the commercial power of Congress in the matter of depriving a person of his property without due process of law.

In the case of *Monong-hela Nav. Co. v. United States, 148 U. S., 334,* Mr. Justice Brewer said:

"But like the other power granted to Congress by the constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the fifth amendment we have heretofore quoted. Congress has supreme control over the regulation of commerce, but if in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this fifth amendment, and can take only on payment of just compensation. The power to regulate commerce is not given in any broader terms than that to establish post offices and post roads; but if Congress wishes to take private property upon which to build a post office, it must either agree upon the price with the owner or in condemnation pay just compensation therefor."

If Congress were to pass a law reducing the rates for interstate transportation of passengers or goods to such a point as to amount to a confiscation of the property of a common carrier engaged therein, there can be no question that such a law would be held to be affected by the fifth amendment. If then said amendment limits said power in the matter of depriving a person of his property without due process of law, no reason can be given why it should not be held to limit said power in the matter of depriving a person of his liberty without due process of law.

36 Yet it has been held in the cases heretofore considered in which the Anti Trust Act of 1890 has been applied, that it does not limit said power of Congress in prohibiting contracts in reasonable restraint of interstate commerce, whether made by common carriers or others engaged therein. The liberty of private contract in this particular is held not to be preserved by said amendment as against the commercial power of Congress.

In the *Addyston Pipe & Steel Company* case, Mr. Justice Peckham said:

"The provision in the constitution does not, as we believe, exclude Congress from legislating with regard to contracts of the above na-

ture, while in the exercise of its constitutional right to regulate commerce among the states. On the contrary, we think the provision regarding the liberty of the citizen is, to some extent limited by the commerce clause of the constitution."

But conceding as I think we must do, that said amendment is a limitation to a certain extent at least upon the commercial power of Congress, in so far as it prohibits a deprivation of liberty without due process of law, is the legislation in question a deprivation of such liberty within the meaning thereof, and hence unconstitutional? This depends entirely upon what liberty is intended to be protected thereby. It is certainly not the liberty to do what one pleases that is thereby protected from invasion by Congress under its commercial power. We have just seen that the liberty of making reasonable contracts in restraint of interstate commerce are not so protected. Congress under its commercial power, notwithstanding said amendment, had the right to enact the Anti Trust Act of 1890 which has been construed to prohibit the making of such contracts, or of any contracts that directly affect by way of restraint such commerce.

In the case of *Champion v. Ames, 188 U. S., 355,* it was held that the Act of Congress prohibiting the transportation of lottery tickets from one state to another by an express company, was valid
37 under said commercial power, notwithstanding said amendment. Mr. Justice Harlan there said:

"But surely it will not be said to be a part of any one's liberty as recognized by the Supreme law of the land, that he shall be allowed to introduce into commerce among the states, an element that will be confessedly injurious to the public morals."

In view of these decisions one must conclude that it is only a liberty that it is reasonable and proper that should not be subject to invasion by Congress under its commercial power that is protected therefrom by said amendment. The matter here then comes to this: Is the liberty of a common carrier engaged in interstate commerce to discharge an employee or to refuse to employ him because of his membership in a labor organization, such a liberty as that it is reasonable and proper that it should not be interfered with by Congress under its commercial power? We have seen that it has been held that the liberty of one engaged in what may be characterized as a lawful private business to so act is such that it is reasonable and proper that it should not be invaded by state legislation, and that it is protected by the fourteenth amendment. But it does not follow from this that the liberty of such a common carrier to so act is such that it is not reasonable or proper that it should be invaded by Congress under its commercial power. A person engaged in a lawful private business and a common carrier engaged in interstate commerce occupy entirely different positions. The former has a fundamental right upon his own choice to engage in and carry on such business. The latter has no such right. It exercises a public function and has no right to exercise it except by consent of the National government express or implied.

The position that a common carrier, such as a railroad for in-

stance, exercises a public function, is upheld by frequent statements in the opinions of the Supreme Court.

In the case of *Charlotte C. & A. R. Co. v. Gibbs, 142 U. S. 386,* Mr. Justice Field said:

38 "Though railroad corporations are private corporations, as distinguished from those created for municipal and governmental purposes, their uses are public. They are formed for the convenience of the public in the transportation of persons and merchandise and are invested for that purpose with special privileges. They are allowed to exercise the state's right of eminent domain that they may appropriate for their uses the necessary property of others upon paying just compensation therefor, a right which can only be exercised for public purpose. And they assume by the acceptance of their charters, the obligations to transport all persons and merchandise upon like conditions and at reasonable rates, and they are authorized to charge reasonable compensation for the services they thus perform."

Mr. Justice Brewer in his dissenting opinion in the case of *Budd v. New York, 143 U. S., 517,* said:

"Property is devoted to a public use when, and only when, the use is one which the public in its organized capacity, to-wit, the state, has a right to create and maintain, and, therefore, one which all the public have a right to demand and share in. The use is public, because the public may create, it, and the individual creating it is doing thereby and *pro tanto* the work of the state. The creation of all highways is a public duty. Railroads are highways. The state may build them. If an individual does that work he is *pro tanto* doing the work of the state. He devotes his property to a public use."

In the case of *L. & N. R. Co. v. Kentucky, 161 U. S. 693,* Mr. Justice Brown said:

"It has been too ofter held that railways were public highways, and their functions were those of the state, though their ownership was private, and that they were subject to control for the common good, to be now open to question."

And in the case of *United States & Joint Traffic Association, 171 U. S. 567,* Mr. Justice Peckham said:

"When the matter of the building of railroads as highways arose, a question was presented whether the state should itself build them or permit others to do it."

And again:

"The business of a railroad carrier is of a public nature, and in performing it the carrier is also performing to a certain extent a function of government which, as counsel observed, requires them to perform the service upon equal terms of all."

It follows then that a common carrier engaged in interstate commerce is exercising a function of the National Government

39 and that by its consent, express or implied. The National Government can itself exercise that function.

In the case of *California v. Central Pac. R. Co., 127 U. S. 1,* Mr. Justice Bradley said:

"The power to construct or to authorize individuals or corporations to construct, national highways and bridges from state to state, is essential to the complete control and regulation of interstate commerce. Without authority of Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce. This power in former times was exerted to a very limited extent. The Cumberland or National road being the most notable instance. Its exertion was but little called for as commerce was then mostly conducted by water, and many of our statesmen entertained doubts as to the existence of the power to establish ways of communication by land. But since, in consequence of the expansion of the country, the multiplication of its products, and the invention of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consideration of the subject has prevailed and led to the conclusion that Congress has plenary power over the whole subject. Of course the authority of Congress over the territories of the United States and its power to grant franchises exercisable therein, are and ever have been undoubted. But the wide power was very freely exercised and much to the general satisfaction, in the creation of the vast system of railroads connecting the east with the Pacific, traversing states as well as territories, and employing the agency of states as well as federal corporations."

And in the case of *Wilson v. Shaw*, decided January 7th 1907, the Supreme Court based the right of the United States to build the Panama Canal, which was questioned therein on its commercial power. Mr. Justice Brewer said:

"Again, plaintiff contends that the Government has no power to engage anywhere in the work of constructing a railroad or canal. *The decisions* of this court are adverse to this contention. * * * These authorities recognize the power of Congress to construct interstate highways. *A fortiori* Congress would have like power with the territories and outside of state lines, for there the legislative power of Congress is limited only by the provisions of the Constitution and cannot conflict with the reserved power of the states."

That differences in matter of action on its, or his, part follow from this difference of position occupied by a common carrier engaged in state or interstate commerce, and a person engaged in private business, is stated by Mr. Justice Peckham in the case of *United States v. Trans-Missouri Freight Association, 166 U. S. 321,* in these words:

40 "The company (a railroad company) may not charge unreasonable prices for transportation, nor can it make unjust discrimination, nor select its patrons, nor go out of business when it chooses, while a mere trading or manufacturing company may do all these things."

It would seem also that differences in the matter of the right of the state, or United States, to control, follows therefrom.

In the case of *Cotting v. Goddard, 183 U. S. 79,* Mr. Justice Brewer intimated that there might be a difference in this particular as to property rights. He said:

"Now in the light of these decisions and facts, it is insisted that the same rule as to the limit of judicial interference must apply in cases in which a public service is distinctly intended and rendered and in those in which, without any intent of public service, the owners have placed their property in such a position that the public has an interest in its use. Obviously there is a difference in the condition of these cases. In the one the owner has intentionally devoted his property to the discharge of a public service. In the other he has placed his property in such a position that, willingly or unwillingly, the public has acquired an interest in its use. In the one he deliberately undertakes to do that which is a proper work for the state. In the other, in pursuit of merely private gain, he has placed his property in such a position that the public has become interested in its use. In the one it may be said that he voluntarily accepts all the conditions of public service which attach to like service performed by the state itself. In the other that he submits to only those necessary interferences and regulations which the public interests require. In the one he expresses his willingness to do the work of the state, aware that the state in the discharge of its public duties is not guided solely by a question of profit. It may rightfully determine that the particular service is of such importance to the public that it may be conducted at a pecuniary loss, having in view larger general interest. At any rate, it does not perform its services with the single idea of profit. Its thought is the general public welfare. If in such a case an individual is willing to undertake the work of the state, may it not be urged that he in a measure subjects himself to the same rules of action, and that if the body which expresses the judgment of the state believes that the particular services should be rendered without profit he is not at liberty to complain? While we have said again and again that one volunteering to do such services cannot be compelled to expose his property to confiscation, that he cannot be compelled to submit its use to such rates as do not pay expenses of the work, and therefore create a constantly increasing debt which ultimately works its appropriation, still is there not force in the suggestion that as the state may do the work without profit, if he voluntarily undertakes to act for the state he must submit to a like determination as to the paramount interests of the public?"

By referring to this statement I do not commit myself to the idea it may be thought to favor. Rather I would be inclined to think that if a state or the United States, declines itself to perform
41 this public function and permits and, as it were, invites others to perform it, and to make an investment of time, thought, labor and capital in its performance, such persons should be entitled to a fair and reasonable return on the investment, and that this right could not be taken from them without just compensation. Such may be said to have been a term in the implied understanding of the parties to the permission or invitation at the time of its acceptance.

But it seems to me clear that there is a difference in this particular as to liberty of action by such common carrier or person.

Whatever may be the control that a state, or the United States, has over a person engaged in private business in the matter of his liberty of action, it is reasonable to hold that it has sufficient control over a common carrier in the matter of its liberty of action as to enable it to bring about an efficient performance of the public function with which it is entrusted, and to prevent action on its part that may cause an interruption in the performance thereof, and this on the ground that another term in that understanding is that it, the common carrier would perform the public function entrusted to it to the very best advantage, and that the state or United States, as the case might be, reserved to itself the power thereafter to control it to an extent reasonably necessary to secure that result. Amongst the things which Mr. Justice Brown said in the quotation above made from his opinion in the case of *L. & N. R. Co. v. Kentucky*, has been held too often to be thus open to question, was "that railways were subject to control for the common good."

And in the case of *Charlotte C. & A. R. Co. v. Gibbs supra*, Mr. Justice Field referred to what followed from the nature of *of* the function performed by railroad corporations, in these words:

"Being the recipients of special privileges from the state, to be exercised in the interest of the public and assuming the obligations thus mentioned, their business is deemed affected with a public
42 use, and to the extent of that use is subject to legislative regulation (Georgia Railroad & Banking Co., *v.* Smith, 128 U. S. 174, 179). That regulation may extend to all measures deemed essential not merely to secure the safety of passengers and freight, but to promote the convenience of the public in the transaction of business with them, and to prevent abuses of extortionate charges and unjust discrimination. It may embrace a general supervision of the operation of their roads, which may be exercised by direct legislation commanding or forbidding under severe penalties, the doing or omission of particular acts, or it may be exercised through commissioners specially appointed for that purpose. The mode or manner of regulation is a matter of legislative discretion."

If this line of reasoning is sound, then said section is not within the fifth amendment. It is not reasonable or proper that the liberty of action of a common carrier engaged in interstate commerce in the particulars covered thereby, should be beyond the control of Congress under its commercial power. It is not such liberty of action as is protected thereby against the exercise of said power, in that it is action calculated to provoke strikes, boycotts and lockouts and cause an interruption and cessation of interstate commerce. The one particular, more than any other, in which such common carrier's liberty of action seems to be within the control of Congress under its commercial power, is in doing that which will, or may obstruct such commerce.

As we have seen Congress has power to prevent obstruction thereof by contracts reasonably restraining it, entered into between competing common carriers. And so great is its power here that it can prohibit such contracts when made by persons not exercising any public function. Had the United States itself exercised this public

function, there can be no question that legislation of this character affecting officials would be entire- legal. There is no reason why the fact that it has entrusted its performance to a private corporation should make any difference.

The only possible ground for holding that said section is in violation of the fifth amendment is, that it has no real and substantial relation to the free course of interstate commerce. I believe
43 that it has such relation thereto. At the very least I cannot say that it has not. I am constrained, therefore to hold that said section is not unconstitutional for this reason.

Still another reason urged in support of the position that said section is unconstitutional is, that it penalizes a common carrier engaged in interstate commerce for discharging an employé because of his membership in a labor organization or otherwise discriminating against him on that ground without reference to the fact whether he is engaged in interstate commerce or solely in intrastate commerce.

This course takes judicial knowledge of the fact that the Louisville and Nashville Railroad Company, a common carrier engaged in interstate commerce, and whose master mechanic is charged with a violation of said section in the indictment herein, operates trains over its railroad solely in Kentucky. It operates such trains between Louisville and Lexington and between Lexington and Maysville, and possibly elsewhere. It is claimed that by said section it is made offense for said company or any officer, agent or employé thereof to discharge or otherwise discriminate against an employé so engaged solely upon any of said intrastate trains, because of such membership—that it is penalized by the very same words that such discriminating action as to an employé engaged in interstate commerce is penalized—that I have no power to limit this broad language to employés not engaged on intrastate trains—and that therefore the whole section must fall. The cases of

U. S. *v.* Steffens (The Trade Mark cases), 100 U. S., 82.
U. S. *v.* Harris, 106 U. S., 629.
Baldwin *v.* Frank, 120 U. S., 678.

are cited in support of the next to the last of these several propositions. To the same effect are the following cases to-wit:

Pullman Co. *v.* Allen, 191 U. S., 171.
Illinois Central R. Co. *v.* McKendree.

Of course the doctrine of those cases must be accepted as
44 sound. But they have no application here. It is not likely that the employés of a railway common carrier engaged in interstate commerce, employed solely upon intrastate trains, do not have anything to do in the course of their employment with interstate commerce, *i. e.*, that such employés though exclusively so engaged are not in reality also adjuncts of interstate commerce. It is so unlikely that I would not be disposed to overthrow the section in question, if such fact would render it unconstitutional, without further information that such was the case. Said section was enacted in view of existing conditions and its validity would not be

affected by an imaginary as distinguished from a real state of things. Take for instance the intrastate trains of the Louisville & Nashville Railroad Company, operating between Louisville and Lexington and between Lexington and Maysville. That company operates no interstate trains over said portion of its railroad. In consequence said intrastate trains do an interstate commerce business and no doubt a very large business of that character. Frequently, if not always, the intrastate freight trains operated thereon have on them interstate cars passing between points thereon and points on its Memphis, Nashville and Knoxville branches to the south of Kentucky. The same is true as to the intrastate passenger trains operated thereon. Beyond question they do a large interstate passenger and express business between said points. Undoubtedly there is a breakage in the passage at Louisville and Paris, but the passage is under one contract and for continuous service. The employés on such trains therefore, though adjuncts of intrastate commerce, are at the very same time adjuncts of interstate commerce. If then, Congress, under its commercial power, has no right to penalize a common carrier of interstate commerce for such discriminating action save only as to interstate employés, the fact that said section applies to such employés, who are also intrastate employés, cannot invalidate it.

In the case of *The Daniel Ball, 10 Wall. 557,* Mr. Justice
45 Field said:

"The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one state and some acting through two or more states, does in no respect affect the character of the transaction. To the extent in which each agency acts, in that transportation, it is subject to the regulation of Congress."

The only lik-lihood of an intrastate train of an interstate carrier not doing any interstate business under any circumstances would be where such train was operated over that portion of the road over which interstate trains ran also.

But again, if it be conceded that there is such a thing in this country as employés of a common carrier engaged in interstate commerce, who are adjuncts solely of intrastate commerce, and that to *invalidate* an act of Congress penalizing such discriminating action towards such employés, would be unconstitutional, there is room to hold that the section in question admits of a construction limiting its application to employés who are wholly, or partially, adjuncts of interstate commerce, notwithstanding the sweeping language in the first section providing that "the term employés as used in this act, shall include all persons actually engaged in any capacity in train operation or train service of any description." It is a cardinal rule of construction that where legislation admits of two constructions—one of which would uphold and the other invalid it—the former will be adopted. Such a construction may be justified by the evident intent of Congress to be drawn from its title and all its provisions to keep within its commercial power.

There is nothing in any of said decisions relied on here, against such a position. I understand the indictment to charge that Cop-

page, the employé, whom it is alleged was discriminated against, was an employé engaged in interstate commerce.

But it is not entirely clear that an act of Congress penalizing such action towards such employés, would be unconstitutional. It would not be the action of a common carrier engaged in intrastate commerce that would be so penalized, but the action of a common
46 carrier engaged in interstate commerce, who also did an intrastate business. Such action towards an employé engaged in the intrastate department of its business, would be as likely to cause an interruption in or embarassment of its interstate department as like action towards an employé engaged in the latter.

In the case of *Gibbons v. Ogden*, Mr. Chief Justice Marshall said:

"The genius and character of the whole government seems to be, that its action is to be applied to all the external concerns of the nation and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, *which do not affect other states and with which it is not necessary to interfere for the purpose of executing some of the general* powers of the government. The completely internal commerce of a state then, may be considered as reserved to the state itself."

And again:

"It is obvious that the government of the Union in the exercise of its express powers, that for example of regulating commerce with foreign nations and among the states, may use means that may also be employed by a state, in the exercise of its acknowledged power; that for example of regulating commerce within the state. If Congress license vessels to sail from one port to another, in the same state, the act is supposed to be necessarily incidental to the power expressly granted to Congress, and implies no claim of a direct power to regulate the purely internal commerce of a state, or to act directly on its system of police."

It seems to me, therefore, that the section in question herein is not unconstitutional for this reason:

A final reason urged in support of the contention that it is unconstitutional is, that it is class legislation, in that it confers privileges upon labor that are not conferred upon nonunion labor. In other words, the claim is that it denies to nonunion labor the equal protection of the laws. But I find no provision in the federal constitution prohibiting class legislation, *i. e.*, prohibiting Congress from denying one the equal protection of the laws. The provision in the Fourteenth Amendment applies only to state action amounting to such denial.

I would not, however, commit myself to the proposition that Congress can deny one the equal protection of the laws, it is too
47 serious a matter to dispose of upon the very slight consideration which I have given to the matter. The necessities of this case do not require that I should dispose of this question herein. The section in question does not come within such a prohibition even if there was one affecting Congressional action. Such a prohibition would not prevent all discrimination, but only such as was

arbitrary and not reasonable, *i. e.*, not based on some reason of public policy. The discrimination here so far as it exists, is based on a reason of public policy. The purpose of the legislation, as we have seen, was to prevent an interruption of interstate commerce. The discriminating action on the part of a common carrier engaged in interstate commerce towards an employé prohibited by the section, is liable to bring about such an interruption. Like discriminating action toward an employee who is not a member of a labor organization, is not liable to produce any such result. There is nobody to back him up in his complaints and demands, or means by which he can bring about such interruption.

It will not do to overlook the fact that Congress in enacting the legislation in question, viewed it not from the standpoint of the labor organization, but from its own. That standpoint was the interest of interstate commerce committed to its charge by the federal constitution.

This reason then does not meet my approval. I am constrained to hold therefore that said section is constitutional.

In disposing of the question I have borne along with me two general considerations. One is that I am not concerned with the policy of said legislation—only with its constitutionality. The other is that I have no right to hold an act of Congress unconstitutional unless it is clearly so. It seems to me that these two considerations in connection with those handled in detail, are sufficient to demand of me that I uphold said law.

The matter has been considered elsewhere in two cases.
48 In the case of *United States v. Hill,* an indictment found in the District of Massachusetts under said section in 1899, Judge Lowell overruled a demurrer thereto and submitted the matter to a jury, which hung. There seems to have been no further trial of the case. He delovered no opinion as to its constitutionality. His action however, involved its being constitutional.

In the Case of *United States v. Scott, 148 Fed. 431,* Judge Evans of the Western District of this state, a prosecution against an employé of the Louisville and Nashville Railroad Company, held the section unconstitutional. A comparison of his opinion with this will indicate wherein we differ.

The demurrer is overruled.

A. M. J. COCHRAN, *Judge.*

And on a day following, to-wit April 2, A. D. 1907, an order was made and entered herein, same being in words and figures as follows, to-wit:

Order.

On motion of United States Attorney the Court being advised it is now ordered that this cause be and the same is set down for trial on Thursday, April 4th, 1907.

And on a day following, to-wit April 4th A. D. 1907, an order was made and entered herein, same being in words and figures as follows, to-wit:

Order.

On this 4th day of April 1907, came the District Attorney. Came also the defendant William Adair in discharge of the first requirement of his recognizance, having as his attorneys S. D. Rouse
49 and B. D. Warfield. Whereupon it was demanded of him the said William Adair, of and concerning the charges in the indictment specified, and he pleads that he is not guilty thereof and for his trial puts himself upon the country. Thereupon came a jury to-wit: G. F. Barnard, John Moss, John Cloud, R. G. Bullock, C. C. Vallandingham, D. C. Carver, W. B. McKee, S. M. Evans, W. P. Dunlap, Henry Bruce, Jas. Ross, and Bob Atkinson, who were elected tried and sworn well and truly to try and true deliverance make between the United States and said defendant. The jury heard the evidence and were instructed by the Court upon the law of the case, and retired to their room to consider the matters before them. Presently returning into Court they announced through their foreman, that they had reached a verdict, which verdict being read by the Clerk was in words as follows to-wit:

"We the jury find the defendant Wm. Adair guilty on 1st count, this 4th day of April, 1907.

D. C. CARVER, *Foreman.*

And on the same day to-wit: April 4th, A. D. 1907, an order was made and entered herein, same being in words and figures as follows, to-wit:

Judgment.

This day came Honorable Jas. H. Tinsley, United States attorney, and the defendant was brought to the bar of the Court in custody of the Marshal, and it being thereupon demanded of him the said William Adair if he had anything to say why the Court ought not now upon the indictment and the verdict of the jury herein proceed to pronounce judgment against him and order execution thereof, according to law. He replies that he had nothing further to allege and nothing further being alleged by him, it is thereupon
50 considered, ordered and adjudged by the court that the said William Adair for the offense against the United States with which he is charged in the indictment herein and of which said offense he has been found guilty by a jury in their verdict, pay to the United States as a fine for the offense aforesaid the sum of $100 and its costs herein expended.

And on the same day to-wit, April 4th A. D. 1907, an order was made and entered herein, same being in words and figures as follows, to-wit:

Order.

This 4th day of April A. D. 1907, came the defendant by his attorneys S. D. Rouse and B. D. Warfield and filed herein and

presented to the Court his petition praying for the allowance of a writ of error, an assignment of errors intended to be urged by him, praying also, that a transcript of the record and proceedings and papers upon the judgment herein rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the Court does allow the writ of error upon the defendant giving bond according to law in the sum of $250.00 which shall operate as a supersedeas bond.

And on the same day to-wit, April 4th A. D. 1907, a Petition for Writ of Error was filed herein, same being in words and figures as follows, to-wit:

51 United States District Court, Eastern District of Kentucky.

UNITED STATES OF AMERICA
vs.
WILLIAM ADAIR.

Petition for Writ of Error.

Now comes the defendant, William Adair, and feeling himself aggrieved by the verdict and judgment in this cause, which judgment was entered herein on the 4th day of April, 1907, says that by said judgment and verdict, and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this defendant prays that a writ of error be issued in this behalf in the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers duly authenticated may be sent to the said Supreme Court of the United States.

S. D. ROUSE,
BENJAMIN D. WARFIELD,
Attorneys for William Adair.

And on the same day to-wit, April 4th A. D. 1907, an Assignment of Errors was filed herein, same being in words and figures as follows, to-wit:

United States District Court, Eastern District of Kentucky.

UNITED STATES OF AMERICA, Plaintiff,
vs.
WILLIAM ADAIR, Defendant.

Assignment of Errors.

The defendant in this action, in connection with his bill of exceptions, makes the following assignment of errors which he avers occurred upon the trial of the prosecution, to-wit:

52 1. The Court erred in overruling defendant's demurrer to the indictment, because sections 1 and 10 of the Act of Congress, approved June 1, 1898, entitled "An Act concerning carriers engaged in interstate commerce and their employees," under which the indictment was found, are unconstitutional and void, for the folfowing reasons, to-wit:

(*a*) Because section 10 is not a regulation of commerce, within the meaning of the commerce clause of the Constitution of the United States:

(*b*) Because said section violates the fifth amendment to the Constitution of the United States, in that it deprives the carrier of its property without due process of law:

(*c*) Because by section 1 of the Act interstate and intrastate employees are so commingled that it is not possible to make it apply only to interstate employees unless the Court reads into the Act something which Congress has not put there, and this the Court should not do:

(*d*) Because section 10 unreasonably classifies union laborers, and seeks to confer upon them privileges which are not secured to non union laborers, and furthermore attempts to confer upon union laborers engaged in train operation and train service, provileges which are not conferred upon union laborers engaged in any other service.

2. Because the Court erred to the prejudice of the defendant in overruling the motion of the defendant made at the conclusion of the Government's testimony in chief, to instruct the jury to find the defendant not guilty of the charges contained in each of the counts of the indictment herein. Said motion is as follows:

Motion.

The defendant moves the Court to instruct the jury to find the defendant not guilty of the charges contained in each of the counts of the indictment herein.

53 3. The Court erred in refusing to charge the jury as requested by the defendant in his offered instruction No. 2, and to which refusal of the Court so to instruct the jury the defendand excepted at the time and still excepts. Said instruction No. 2 is as follows:

Instruction No. 2 Offered.

The Court instructs the jury that although they may believe from the evidence that the defendant, William Adair, did discriminate against O. B. Coppage, by discharging him from the employment of the Louisville and Nashville Railroad Company because of his membership in a labor organization known as the Order of Locomotive Firemen, or that said Adair did threaten said Coppage with loss of employment because of his membership in said labor organization, still, the jury should find the defendant not guilty, for the reason that the Act of Congress of the United States of June 1, 1898, entitled

"An Act concerning carriers engaged in interstate commerce and their employés," is unconstitutional and void, and especially the first and tenth sections of said Act, under which the indictment herein was found, are unconstitutional and void.

4. The Court erred in charging the jury as follows:

(See Bill of Exceptions on page 72 of this record.)

To all of which counsel for the defendant, in the presence of the jury and before they retired, excepted and still excepts.

5. The Court erred in overruling defendant's motion in arrest of judgment, to which action of the Court defendant excepted at the time and still excepts.

All of which defendant assigns as error herein and files this his assignment of errors.

54 Wherefore, the defendant, William Adair, prays that the judgment of the District Court of the United States for the Eastern District of Kentucky be reversed, and that said District Court be directed to sustain the demurrer to said indictment, and to discharge the defendant.

S. D. ROUSE,
BENJAMIN D. WARFIELD,
Attorneys for Defendant.

And on the same day to-wit, April 4th, A. D. 1907, a Writ of Error was field herein, same being in words and figures as follows to-wit:

United States District Court, Eastern District of Kentucky, at Covington.

THE UNITED STATES OF AMERICA,
Eastern District of Kentucky, ss:

Writ of Error.

The President of the United States of America to the Honorable Judges of the District Court of the United States for the Eastern District of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court, before you, or some of you, between United States, plaintiff, and William Adair, defendant, a manifest error hath happened, to the great damage of the said William Adair, defendant as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the City of Washington, D. C., in the said Supreme Court of the United States on the 4th day of May next, to be then and there held, that the record and proceedings

aforesaid being inspected the said Supreme Court of the
55 United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller Chief Justice of the United States, this 4th day of April A. D. 1907, and in the 131st year of the Independence of the United States of America.

Attest:

JOS. C. FINNELL,
Clk U. S. Dis't C't, E. Ky. D.

Allowed by
A. M. J. COCHRAN,
U. S. Dis't Judge.

And on the same day to-wit, April 4th A. D. 1907, a Bond was filed herein, same being in words and figures as follows, to-wit:

Bond.

Know all men by these presents, that we, William Adair as principal, and John L. Brady as sure*ties*, are held and firmly bound unto the United States of America in the full and just sum of Two Hundred and Fifty Dollars to be paid to the said The United States of America certain attorneys, executors, administrators or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 4th day of April in the year of our Lord one thousand nine hundred and seven.

Whereas, lately at a Judgment in a suit depending in said Court, between the United States of America as plaintiff and William Adair defendant, a judgment was rendered against the said William
56 Adair and the said William Adair having obtained Writ of Error and filed a copy thereof in the Clerk's office of the said Court to reverse the Judgment in the aforesaid suit and a citation directed to the said the United States of America, citing and admonishing it to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington, on the 4th day of May next.

Now the condition of the above is such, that if the said William Adair shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

WILLIAM ADAIR, [SEAL.]
JOHN L. BRADY. [SEAL.]

Sealed and delivered in the presence of—
C. A. WELLS.
C. E. SMITH.

Approved by
——— ———.

Upon the back of said bond, the following endorsement appears: No. 3311 The United States of America, *vs.* William Adair. Bond on Writ of Error to the United States Supreme Court. Filed April 4th 1907. Jos. C. Finnell, Clerk.

And on another day of said term of said court, to-wit, on April 12, 1907, the Court now signs and seals the defendant's bill of exceptions heretofore tendered herein and orders the same to
57 be filed and made a part of the record.

The bill of exceptions above referred to is as follows:

United States District Court for the Eastern District of Ky.

UNITED STATES, Plaintiff,
vs.
WILLIAM ADAIR, Defendant.

Bill of Exceptions.

Be it remembered, that on the trial of this prosecution in this court at the April term, A. D. 1907, of said court, the Hon. A. M. J. Cochran, presiding and the plaintiff being present by J. H. Tinsley, and the defendant being present in person and by S. D. Rouse and Benjamin D. Warfield, the following prodeedings were had, to-wit:

A jury was empanelled and sworn according to law, and thereupon the plaintiff, to sustain the issue upon its part, offered
58 the following testimony, as its evidence in chief.

It is agreed between the Government and the defendant that the Louisville and Nashville Railroad Company is a Kentucky corporation engaged in interstate and intrastate commerce and that the witness Coppage was an employee engaged for the Railroad Company in both interstate and intrastate commerce.

Thereupon the Government to maintain the issue on its part, called as a witness O. P. COPPAGE, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. TINSLEY:

Q. Where do you live, Mr. Coppage?

A. At the present time I live at 2036 Old Banklick Road now known as Covington, formerly known as Central Covington.

Q. What is your business?

A. My present occupation is locomotive fireman.

Q. How long have you been a locomotive fireman?

A. Well, the first actual service I rendered was on the 4th day of July, 1899, for the Louisville and Nashville.

Q. You entered their service?

A. On that day I made the first trip for myself. I made two former trips from Latonia freight yards to Louisville, two trips that

we called student trips to learn the road, as fireman. On the 4th day of July, 1899, I made my first trip for myself as an employee of the Louisville and Nashville as fireman.

Q. How long did you continue in that employ?

A. I continued as locomotive fireman from the 4th day of July, 1899, until the morning of the 21st day of October, 1903.

Q. On the 21st day of October, 1903, and for some time before that, where were you engaged and where were you at work?

A. When I was first employed as locomotive fireman I was given what is known as the L. C. & L. division of the L. & N.
59 between Louisville and Cincinnati or Latonia. I am not certain what time I served on that division, but it was around eight months. I was taken from that division and put on what is known as the Kentucky Central Division of the L. & N. running between Cincinnati, Covington and Livingston and Lexington. They have several small branches off from that stem of the main line.

Q. Did you continue in that service up to the 21st of October, 1903?

A. Yes sir, as locomotive fireman I did, and nearing the end of my service there I asked for what I called my rights in age on the road and I was told I had no rights by W. S. Gray. Then I got what was known as the extra locomotive yard terminal in the Central Covington yards.

Q. Where did that run from?

A. A terminal job known as the switch engine in the making up and breaking up and distributing of cars in the yard.

Q. Run from where?

A. In the terminals of the L. & N.

Q. Where were those terminals at that time?

A. It was at a terminal known as Kentucky Central at Covington. It was a Louisville division at Louisville, and on some occasions I would transfer cars from Latonia to Central Covington, and Latonia to K. C. and also K. C. down to Chesapeake and Ohio yards better known as K. C. Junction.

Q. Were you engaged in any service that ran into Cincinnati?

A. Yes, sir, I was, off and on in their passenger service.

Q. How long before you were discharged from the company?

A. I was really holding my rights and holding a regular passenger run at the time, but in case they needed an engineer in the yard I was taken off and held off my passenger run and
60 an extra man run while I was employed in the yard.

Q. When you were discharged you ran from where?

A. From Cincinnati, sometimes into Lexington and sometimes into a place known as Stanford on the Knoxville Division.

Q. These passenger trains you ran on as fireman carried freight and property?

A. To my knowledge they carried passengers, express and mail.

Q. Do you know Mr. Adair?

A. Personally acquainted with him, yes sir.

Q. What position did he hold with the L. & N. at that time?

A. He held what is known to employees as Master Mechanic.

Q. Where was his office?
A. His main office was located at Central Covington, right near the Kentucky Central shops.
Q. Who employed you as locomotive fireman?
A. Well, I will have to state to you the way it came around.
Q. What connection did Mr. Adair have with your employment?
A. He had to sanction my employment before I could have entered into the service.
Q. As locomotive fireman?
A. Yes sir; as locomotive fireman.

(By the COURT:)

Q. Did he have charge of the employment and discharge of firemen?
A. To the best of my knowledge, yes sir.

(By Mr. TINSLEY:)

Q. On or before the 21st of October, 1903 were you a member of any labor organization?
A. Yes, sir.
Q. What organization was it?
A. The Brotherhood of Locomotive Firemen.
Q. How long had you been a member of that organization, before October 21st, 1903?
61 A. Between two and three months.
Q. At the time you were a member of that organization you were in the employ of the L. & N. Railroad as fireman?
A. I was; yes, sir.
Q. State to the jury what took place between you and Mr. Adair with reference to your work and your service in the L. & N. as a locomotive fireman, on and before the 21st day of October, 1903?
A. Well, I was put on in that capacity for myself on the 4th day of July, 1899, and worked from that day as locomotive fireman up until the latter part—that is, all my service, as I said before, was as extra man in the terminals on a yard engine. I was never taken into the office that I know of or have any recollection of, or reprimanded for anything as far as I know, and can further state that upon this occasion of my dismissal I was told by Mr. Adair that my past record was a clear one, with the exception of some things.
Q. Just go on and state what took place?
A. On the evening of the 20th day of October I came in on passenger run known as No. 6.

(By the COURT:)

Q. Where was that from?
A. From Livingston, Ky., and terminated at the Grand Central Depot in Cincinnati, on the 20th day of October, 1903. It was along between the hours of six and seven o'clock in the morning of October 21st, 1903, when a party known as the L. & N. call boy came to my house for the purpose, as I thought, of calling me for work.
Q. State what you did?

A. I responded to the call and presented myself in person before Mr. William Adair in his office. He was not there.

(By Mr. TINSLEY:)

Q. In Central Covington?

A. In Central Covington.

Q. That was on the morning of the 21st?

A. That was on the morning of the 21st, in company with
62 Mr. Frank. Mr. Adair was not present in the office and we were seated. Mr. Adair came in and he spoke and says, "Good morning."

Q. At that time in what capacity was Mr. Adair acting?

A. In the same capacity he always did, I suppose, as Master Mechanic of said road.

Q. State what took place between you and Mr. Adair?

A. He came in and spoke, "Good Morning." In the meantime he walks over to a sliding door between his office and the operator's office and shuts the door so there was nobody in the room except Mr. Adair, J. H. Frank and myself. He says, "Boys, I have you on the carpet," and we asked what for? He says, "You are members of the Firemen." I says, "Yes." He says, "Don't you know that you cannot belong to the Brotherhood,"—that was the remark that he made—"Don't you know that you cannot belong to the Firemen,"—that is the way he put it,—"and work for the Company?" And I says, "No, sir." He says, "You cannot." And of course I was asking him then what was to be done? "Bring me a withdrawal card," he says, "you have got your job." I says, "I can't do it." He says, "You can't work for the L. & N." I says "Why?" He says, "The Company says you are not fit subjects to be in the employ," was the remark he made. He says, "My advice to you is to resign, go somewhere and get a job and get me to recommend you," and I told him, "I am satisfied with my job and don't intend to quit." He still held on to his statement that I could not work for the L. & N. and belong to the Firemen. I then asked him, I says, "How is my past record? What has this Company got against me?" He says, "Your past record is clear." I says, "What are you discharging me for, what have they got against me?" "Because you are a member of the Firemen," or "Brotherhood of Locomotive Firemen"—which he said I could not state positively, whether Firemen of Brotherhood of Locomotive Firemen. I says, "Will you please put
on my time check what I am discharged for?" He says,
63 "For being a member of the Brotherhood of Locomotive Firemen?" He said he wouldn't do it. I asked him why. He said, "It will do you no good, because you go to get your money you have got to turn loose of it and it will do you no good." I refused to accept my time check and it laid in his office between a week and ten days, I am not positive. Finally circumstances forced me to go and get my money to keep me on my uppers and I drawed my time.

Q. Were you discharged on that day?

A. My work ceased. I never laid off. I was in the employ of the Company, but I never worked another day since. He told me I was discharged.

Q. He told you at that time you were discharged?

A. If I did not bring a withdrawal card from the Locomotive Firemen, and I refused and I considered myself discharged, which I was and never worked another day for the Louisville and Nashville Company since my time check was made out.

(By the COURT:)

Q. What do you mean by time check?

A. Well, that was an order on the Treasurer at Pike Street office to get what was coming to me, for the time I rendered service for the Company.

(By Mr. TINSLEY:)

Q. The balance of pay due you.

A. Yes, sir, due to me up until the 21st.

Q. You say you never drew that?

A. No, sir, up to within two or three days. I could not state the date.

Q. Up to what time did they pay you?

A. They paid me till the 21st of October. The last time I worked for the Company was the 20th day of October and I got paid for that time and when I cashed my time check I got paid for everything I had done. After I drew my money on that check the Company owed me nothing at all.

Q. That discharge took place in Central Covington?

A. Yes, sir. I drew the money on the time check at the
64 Pike Street Depot.

Q. Have you been in the employ of the L. & N. since that time?

A. No, sir.

Q. I believe you stated you were in the employ of the L. & N. from July 4th, 1899, until that time?

A. As a locomotive fireman I worked for the L. & N.

Q. And was in their employ continuously?

A. From July 4th, 1899, until the 21st of October, 1903.

Cross-examination.

By Mr. ROUSE:

Q. Where are you employed now?

A. I am employed with the Chesapeake & Ohio.

Q. As fireman?

A. As a locomotive fireman; yes, sir.

Q. When you were in the employment of the Louisville & Nashville Railroad Company as a fireman, from what points were your runs and to what points when acting as a fireman on freight trains?

A. When I first entered the service as fireman?

Q. I mean within a couple of months, say, before you finally left the employment of the Company.

A. As I stated before, while I was not employed regularly in the capacity of fireman, I held the position of fireman when there was any need of me to run a yard engine in Central Covington, and I was relieved from the passenger engine and a man put in my place. When I was on the passenger engine I ran from the Grand Central in Cincinnati, to a place called Stanford and Lexington.

By the COURT:

Q. You didn't run on freight there?

A. Probably for a year before I was discharged, I was not on freight.

Q. So far as your service was concerned at the time of
65 dismissal, you were on a passenger train?

A. At the time of dismissal.

Q. For a year before dismissal, so far as you ran, it was on passenger trains and not freight trains?

A. It makes no difference. As a fireman you are subject to the call of duty.

Q. I didn't ask you what calls you were subject to, but actually in your service, what trains did you run on—what kind of trains?

A. Passenger trains.

Q. On the night before you were discharged that was the kind of train you were on?

A. Yes, sir, when I was firing.

By Mr. ROUSE:

Q. You were acting entirely, then, were you, as fireman on passenger trains on the Kentucky division between Cincinnati, in Ohio, and some points in Kentucky, is that so?

A. Yes, sir; I had a regular passenger run from Cincinnati, to points in Kentucky.

Q. And working in the terminals, you were working entirely within the state of Kentucky, in Covington, and between Covington and Latonia?

A. Yes, sir. If the Yard Master seen fit to run me over to Cincinnati, I went. On occasion I made trips into Cincinnati when engaged as yard engineer.

Q. While you were yard engineer you sometimes made runs across the river into Ohio?

A. Yes, sir; into Cincinnati.

Q. And part of the time your runs were entirely within the state of Kentucky?

A. Yes, sir; part of the time my runs were in Covington and there was runs part of the time that I made in Cincinnati.

Q. The passenger trains on which you were acting as fireman made stops within Kentucky and took on passengers within
66 Kentucky, didn't they, which passengers were carried to some other point in Kentucky?

A. I don't know where the passengers were carried to, but I know we made stops in Kentucky and also received passengers.

Q. You hauled passengers and received passengers from other points in Kentucky as well as across the river?

A. Yes, sir.

Q. Had you any conversation with Mr. Adair with reference to your membership in the Labor Council prior to the 21st of October?

A. None whatever.

Q. Nothing had passed between you?

A. No sir.

Redirect examination.

By Mr. TINSLEY:

Q. If I understand you, even while you were working as yard fireman of the engine here in the yards, you were liable to be ordered to Cincinnati at any time and did make trips into Cincinnati occasionally?

A. Yes, sir.

Q. And the last time you made was the passenger run in which you went into Cincinnati?

A. Yes, sir; the last day's work I did for the Company was on a passenger train which landed in the Grand Central Depot in Cincinnati.

Q. Did your employment have any definite location or were you subject to be sent in any direction by the Master Mechanic?

A. The Master Mechanic has the right to send us on any division. That is my knowledge of Mr. Adair's authority. He had the right, at that time, to put me on the Kentucky Central Division
67 between Louisville and Cincinnati or could have worked me, if he had seen fit, between Louisville and Lexington on the Lexington Division. I am not positive, but if I understand right his jurisdiction extended at that time over the Division between here and Livingston, Ky.; also over a route known as the old road.

Q. You mean Cincinnati and Louisville?

A. Cincinnati and Louisville and Covington and Louisville and between Louisville and Lexington, Ky., and also over the Kentucky Central branch from Cincinnati through Covington to a place called Livingston.

Q. You were subject to his orders?

A. Subject to his orders; wherever he seen fit to send me I would have had to went.

Q. Have you told all that took place between you and Mr. Adair?

A. Told all of it.

Q. That you remember?

A. Well, no, sir; I have not told quite all of it because I was interrupted partly. There was some other few things that had taken place in the conversation.

Q. Was there anything said between you and Mr. Adair about his orders to discharge all Union men?

A. That was not the way it was done. We asked why it was done and he said he had orders to do it. Furthermore he told me that

if I would bring him a withdrawal card from the Locomotive Firemen that he would promote me, that I would not have to fire any more. There is another statement that was made in this conversation the day that I was discharged.

By the COURT:

Q. You were classed in the L. & N. service as a fireman; that was your standing?

A. That was my standing. I never was promoted by the L. & N.; that is, I never stood the examination on machinery, the mechanical examination.

68 Q. And your membership was in the Brotherhood of Firemen?

A. Brotherhood of Locomotive Firemen.

Q. And that order of Locomotive Firemen, is that a labor organization?

A. It is a labor organization and also an insurance organization.

Q. All I wanted to know was whether it was a labor organization?

A. Yes, sir, it is.

Q. Now the Louisville & Nashville Railroad Company, do you know where it runs trains from and where to?

A. Well, I am pretty positive as to some places it runs from and to.

Q. In the North where does it start?

A. The only northern terminal I know of is Cincinnati, Ohio.

Q. South how far does it go?

A. My understanding is that they operate trains through transfers, etc., as far as Mobile, Ala., and New Orleans.

Q. They run from Cincinnati south through Kentucky and Tennessee?

A. That is my understanding, that they have through trains from Cincinnati to New Orleans, La.

And also J. H. FRANK, who being first duly sworn, testified as follows:

Direct examination.

By Mr. TINSLEY:

Q. Where do you live?

A. Latonia, Ky.

Q. What is your business?

A. Locomotive engineer. I have been such for about four

69 years.

Q. Do you know Mr. Coppage and Mr. Adair?

A. Yes, sir.

Q. Were you at any time in the employ of the L. & N. Railroad as locomotive fireman?

A. Yes, sir.

Q. When was that?

A. I started in the service of the Company on the 11th day of November, 1894, and served until the 21st of October, 1903.

Q. In what capacity did you serve?
A. Fireman.
Q. Were you present at the time Mr. Coppage and Mr. Adair had a conversation in which Mr. Coppage was discharged from the service of the Company?
A. Yes, sir.
Q. You may tell the jury what you recollect of what took place on that occasion?
A. All I remember of it, he calls us up here between the hours of six and seven in the morning of the 21st of October. He was not at the office when we got there and we sat down and waited for him. When he came in he says, "Good morning, boys." We bid him good morning. He says, "Boys, I am very sorry and I hate to do it, too, but we have got orders."
Mr. ROUSE: I would like this to be confined entirely to what passed between Mr. Adair and Mr. Coppage.
Mr. TINSLEY: Was Mr. Coppage present?
A. Yes, sir.
Q. Was he speaking to either one or both of you?
A. It was pretty hard to tell. I think he was talking to both of us. He said he had orders from headquarters to dismiss us and I asked him what it was for, what's the trouble. He says, "You boys belong to the Firemen's Brotherhood and the Company is opposed to the Firemen's Brotherhood." I asked Mr. Adair why the Company was opposed to the Brotherhood and he says, "Well, it
70 caused the Company so much trouble and they didn't intend to have them working in their employ; that they broke their contract in several cases." He says, "If you get a withdrawal card, Jack, you can go to work." I didn't get no withdrawal card and so it went on and then the boys and I we had a falling out.
Q. What took place between you and Mr. Coppage and Mr. Adair at that time?
A. That is about it.
Q. Did Mr. Coppage work for the Company any after that time?
A. No, sir.
Q. What was that Order of Locomotive Firemen?
A. The Brotherhood of Locomotive Firemen was a labor organization.
Q. It is a labor organization?
A. Yes, sir, and benefit organization.
Q. In what capacity was Mr. Adair acting at that time?
A. Master Mechanic of L. & N. Railroad.
Q. Do you know what his duties were with reference to engineers and firemen?
A. It was a case of hire and fire, that is all.
Q. Did he hire and discharge them?
A. I suppose he did; yes, sir.
Q. Did you work for the Company any after that?
A. Yes, sir. I was idle some time.
Q. You worked on?

A. No, I didn't work on. I was put out for a while, and then went back to work.
Q. You were not discharged at that particular time?
A. I was told I could not go to work.
Q. Were you afterwards employed by the Company?
A. No, sir, I wasn't never employed. I just went back to work. The boys and I fell out and I just went on and went back
71 to work.

The COURT: You fell out with the labor men?
A. They got to wrangling between themselves.

No cross-examination.

Mr. TIERSLEY: That is the case.

At the close of the foregoing evidence in chief, offered by the plaintiff, and which was all of the evidence introduced on trial of this case, the counsel for the defendant moved the Court to direct a verdict for the defendant, submitting the same and the reasons therefor in writing, in two instructions, No. 1 and No. 2, in words and figures following:

I.

The defendant moves the Court to instruct the jury to find the defendant not guilty of the charges contained in each of the counts of the indictment herein.

II.

The Court instructs the jury that although they may believe from the evidence that the defendant, William Adair, did discriminate against O. B. Coppage, by discharging him from the employment of the Louisville and Nashville Railroad Company because of his membership in a labor organization known as the Order of Locomotive Firemen, or that said Adair did threaten said Coppage with loss of employment because of his membership in said labor organization, still, the jury should find the defendant not guilty for the reason that the Act of Congress of the United States of June 1, 1898, entitled, "An Act concerning carriers engaged in interstate commerce and their employés," is unconstitutional and void, and especially the first and tenth sections of said Act, under which the indictment herein was found, are unconstitutional and void.
72 The Court overruled said motions and refused so to instruct the jury, to which ruling of the Court counsel for defendant then and there excepted, and still excepts.
The defendant declined to introduce any testimony in his behalf.
The foregoing was all the evidence in the case.
The Court of its own motion then instructed the jury as follows:

Charge of the Court.

GENTLEMEN OF THE JURY:

Congress passed a law on the first day of June, 1898, entitled, "An Act concerning carriers engaged in interstate commerce and

their employés," and by the tenth section of the Act it provided among other things:

That any employer subject to the provisions thereof, and any officer, agent or receiver of such employer, who shall threaten any employé with loss of employment, or shall unjustly discriminate against any employé because of his membership in such labor corporation, association or organization, shall be guilty of a misdemeanor.

The section makes it a misdemeanor for any employer subject to the act, or any officer or agent or receiver of such employer to do either of two things: That is, threaten any employé with loss of employment, or unjustly discriminate against any employé because of his membership in a labor corporation, association or organization.

Now, the kind of employer that is subject to this act is any common carrier engaged in the transportation of passengers or property wholly by rail or partly by railroad and partly by water for a continuous carriage or transportation from one state or territory of the United States or the District of Columbia, to another state or territory of the United States or the District of Columbia, or from any place in the United States through an adjacent portion
73 of the country to another place in the United States, through a foreign country. For the purposes of this case such employer is any company actually engaged in interstate commerce, that is, any common carrier transporting passengers or property from one state to another. That is the kind of employer that is subject to the provisions of the act and if it does either one of the two things named, or any officer or agent receiver thereof does either of the two things, it or he is guilty of a misdemeanor.

In this indictment that you are trying, there are two counts; that is, the defendant Adair, is charged with two offenses. In the first count he is charged with the offense of unjustly discriminating against O. B. Coppage, the witness on the stand, because if his membership in the order of Locomotive Firemen, a labor organization; and in the second count he is charged with the offense of threatening him with the loss of employment because of such membership.

In order that the defendant may be guilty of the offense charged in the first count of the indictment it is essential that you should believe from the evidence these things; That the defendant was the Master Mechanic of the Louisville & Nashville Railroad Company at the time of the doing of the things complained of; that the Louisville & Nashville Railroad Company was a common carrier engaged in interstate commerce at that time; that the witness O. B. Coppage, was in the defendant's employ as a fireman and engaged in interstate commerce, and was a member of the order of Locomotive Firemen, a labor organization, and then that the defendant, William Adair, unjustly discriminated against him because of his membership in such labor organization.

Those are the facts that make up and constitute the offense charged in the first count; so that if you find those facts beyond a reasonable doubt; it is your duty to find the defendant guilty; but

unless you so find beyond a reasonable doubt, then you must find the defendant not guilty.

74 I will say that if the defendant on the occasion testified in evidence discharged the witness Coppage from his employment because of such membership, if that was the reason and motive for the discharge, then you would be authorized under the evidence to find that he unjustly discriminated against him because of such membership.

In the second count of the indictment, the facts making up the offense charged are, with one exception, the same as in the first count; that is, that the defendant, William Adair, at the time of the doing of the things complained of was Master Mechanic of the Louisville & Nashville Railroad Company; that the Louisville & Nashville Railroad Company was a common carrier engaged in interstate commerce; that the witness, O. B. Coppage, was in its employ as a fireman and himself engaged in interstate commerce and was also a member of the order of Locomotive Firemen, a labor organization, and, lastly, that the defendant, William Adair, threatened him with loss of employment because of his membership in such organization.

Now, gentlemen, under the evidence, as I view it, it is not possible for you to find the defendant guilty of both of the offenses charged. You can only find him guilty of one, and which one you can find him guilty of depends upon how you view the transaction that took place on the 21st day of October, 1903, as testified to by the witnesses. If you believe from the evidence beyond a reasonable doubt that that was an actual discharge of O. B. Coppage, by the defendant, it is your duty to find him guilty under the first count, if you believe beyond a reasonable doubt that all the other facts existed. This count charges him with unjustly discriminating against the witness because of his membership in the labor organization, and that he did so by discharging him.

If, however, your view of the transaction is that it was simply a threat of loss of employment because of his membership, and you believe beyond a reasonable doubt that and the other facts, it is your duty to find him guilty under the second count.

75 I will leave it for you to determine what was the nature of the transaction. If it was actual discharge by defendant and you find that beyond a reasonable doubt, and the other facts in like manner, then it is your duty to find the defendant guilty under the first count. If, however, it was no more than a threat of loss of employment because of such membership, then it *was* your duty to find him guilty under the second count.

I think I should say to you, gentlemen, that you have nothing to do with the policy of such legislation. That is a matter for Congress to determine. The sole thing for you to determine is whether or not the defendant has been guilty of the things charged in the indictment to which I have drawn your attention.

The defendant objected and excepted in the presence of the jury and before the jury retired to deliberate upon the case, to the entire

charge of the Court, because the charge of the Court authorized the jury to find the defendant guilty, whereas the Act of Congress under which the indictment was found is wholly invalid and contrary to the provisions of the Constitution of the United States, and void.

The jury thereupon retired to consider their verdict, and having returned into court a verdict for the plaintiff, which verdict is as follows:

"We, the jury find the defendant William Adair, guilty on the 1st count, this 4th day of April, 1907.

D. C. CARVER, *Foreman.*

Whereupon the defendant moved the Court in arrest of judgment, copy of which is as follows:

76 United —— District Court, Eastern District of Kentucky, at Covington.

UNITED STATES OF AMERICA
vs.
WILLIAM ADAIR.

Motion in Arrest of Judgment.

The defendant, William Adair, moves the Court to arrest the judgment herein, and set aside the indictment under which he was tried herein:

First. Because said indictment was returned under authority of and by virtue of, an Act of Congress of the United States of June 1, 1898, entitled, "An Act concerning carriers engaged in interstate commerce and their employés," which said act is invalid, unconstitutional and void; and because the conviction of this defendant under said indictment deprives him of the rights guaranteed to him by the Constitution of the United States, and the amendments thereto.

S. D. ROUSE,
BENJAMIN D. WARFIELD,
Attorneys for Defendant.

And the Court overruled said motion, whereupon the defendant excepted and the Court then called the defendant William Adair to the bar and asked the said Adair whether he had aught to say why judgment should not be pronounced, and the defendant William Adair answered in the negative, and the Court thereupon rendered the following judgment:

Judgment.

This day came Hon. Jas. H. Tinsley, United States Attorney, and the defendant was brought to the bar of the Court in custody of the Marshal and it being thereupon demanded of him the said William Adair, if he had anything th say why the Court ought not now upon

77 the indictment and the verdict of the jury herein proceed to pronounce judgment against him and order execution thereof, according to law, he replied that he had nothing further to allege and nothing further being alleged by him it is thereupon considered, ordered and adjudged by the Court that the said William Adair, for the offense against the United States, with which he is charged in the indictment herein, and of which said offense he has been found guilty by a jury in their verdict, pay to the United States a fine for the offense aforesaid the sum of $100, and its costs herein expended.

The defendant afterwards on to-wit, 4th day of April, 1907, moved the Court to set aside said verdict and grant a new trial. Said motion was as follows:

United States District Court for the Eastern District of Ky.

UNITED STATES, Plaintiff,
vs.
WILLIAM ADAIR, Defendant.

Motion for New Trial.

The defendant moves that the verdict herein rendered be vacated, and a new trial awarded, for the following reasons:

First. The Court erred in refusing to instruct the jury to render a verdict for the defendant, as requested in the two instructions No. 1 and No. 2 offered by the defendant and refused by the Court.

Second. The Court erred in giving to the *court* the instructions which were given.

BENJAMIN D. WARFIELD,
S. D. ROUSE,
Attorneys for Defendant.

Which motion for a new trial was, after due consideration by the Court, on the 4th day of April, 1907, overruled, to which action of the Court defendant excepted, and prayed an appeal to the Supreme Court of the United States, which is granted.

78 And now, in furtherance of justice, and that right may be done the defendant, William Adair, tenders and presents the foregoing as his Bill of Exceptions in this case to the action of the Court, and prays that the same may be settled and allowed and sealed by the Court, and made a part of the record, and the same is accordingly done this 12th day of April, 1907.

A. M. J. COCHRAN,
Trial Judge.

And on another day to-wit, April 4, A. D. 1907, a Citation was issued herein, same being in words and figures as follows, to-wit:

United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA, *Sixth Judicial Circuit, ss:*

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington on the 4th day of May next, pursuant to a Writ of Error, filed in the Clerk's Office of the District Court of the United States for the Eastern District of Kentucky, wherein William Adair is plaintiff in error, and you are defendant in error to show cause, if any there be why the judgment rendered against the said plaintiff in error as to the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 4th day of April, in the year of our Lord one thousand nine hundred and seven, and of the Independence of the United States of America the one hundred and — 131.

79 A. M. J. COCHRAN,
United States District Judge,
Eastern District of Kentucky.

And on a day following, to-wit, April 17, A. D. 1907, said citation was returned and filed herein, same being endorsed as follows, to-wit:

The within citation this day handed to me and copy delivered.—April 17, 1907.

J. H. TINSLEY,
U. S. Attorney, E. D. Ky.

80 UNITED STATES OF AMERICA,
Eastern District of Kentucky, ss:

I, Jos. C. Finnell, Clerk of the United States District Court, for the Eastern District of Kentucky, at Covington, hereby certify that the foregoing 79 pages contain a full, true and correct transcript of the record and proceedings had in the case set out in the caption hereto, as the same appears from the records and files of this office.

Witness, my hand as Clerk of said United States District Court, for the Eastern District of Kentucky, at Covington, and the Seal thereof, this 18" day of April, A. D. 1907.

[Seal United States of America, K't'y Dist. Court.]

JOS. C. FINNELL,
Clerk U. S. Dist. Court, E. Dist. of Ky.

Endorsed on cover: File No. 20,685. E. Kentucky D. C., U. S. Term No. 730. William Adair, plaintiff in error, *vs.* The United States. Filed April 30th, 1907. File No. 20,685.

Office Supreme Court, U. S.
FILED.
MAY 11 1907
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 293.

WILLIAM ADAIR, - - - - - - - - - - - Plaintiff in Error,

vs.

UNITED STATES OF AMERICA, - - - - Defendant in Error.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY, SITTING AT COVINGTON, KY.

NOTICE, MOTION AND GROUNDS OF PLAINTIFF IN ERROR TO ADVANCE FOR HEARING.

BENJAMIN D. WARFIELD,
Counsel for Plaintiff in Error.

HENRY L. STONE,
SHELLEY D. ROUSE,
Of Counsel.

F. C. NUNEMACHER PRESS, LOUISVILLE, KY.

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 720.

WILLIAM ADAIR ..... *Plaintiff in Error,*

v.

UNITED STATES OF AMERICA .....*Defendant in Error.*

Appeal from the Dictrict Court of the United States for the Eastern District of Kentucky, sitting at Covington, Ky.

NOTICE.

To the Hon. Chas. J. Bonaparte, Attorney General of the United States, Counsel for Defendant in Error:

Please take notice that I shall make a motion for the Plaintiff in Error in the above styled case, before the Supreme Court of the United States at the opening of its session on Monday, May 13, 1907, or as soon thereafter as counsel can be heard, to advance the above-styled case for hearing at the October term, 1907, of said court, at such time as the court may direct, and in support of said motion will file and present to the court at the hearing of

said motion, the grounds therefor, a copy of which motion and grounds is herewith served upon you, dated May 2, 1907.

BENJAMIN D. WARFIELD,
Counsel for Plaintiff in Error.

Service of above notice is accepted, and the motion to advance assented to. This May 4, 1907.

HENRY M. HOYT,
Solicitor General of the United States, and
Counsel for Defendant in Error.

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 720.

WILLIAM ADAIR ..... *Plaintiff in Error,*

v.

UNITED STATES OF AMERICA ..... *Defendant in Error.*

MOTION AND GROUNDS OF PLAINTIFF IN ERROR TO ADVANCE FOR HEARING.

Now comes the Plaintiff in Error and moves the court to advance this case for hearing, as early as may be convenient to the court, at its October Term, 1907, on the following grounds, to-wit:

The Plaintiff in Error having been convicted and fined for an alleged violation of Sections 1 and 10 of the Act of Congress, approved June 1, 1898, entitled "An Act concerning carriers engaged in interstate commerce and their employes," 30 Stat., 424, 3 U. S. Compiled Stats., 1901, pp. 3205-3210, contends that said sections are unconstitutional and void:

(1) Because Section 10 is not a regulation of commerce within the meaning of the commerce clause of the constitution.

(2) Because said section violates the fifth amendment to the Federal Constitution in that it deprives the Plaintiff in Error of his property without due process of law.

(3) Because, by the first section of said Act, interstate and intrastate employes are so commingled that it is not possible to make the Act apply only to interstate employes, unless the courts read into the Act something which Congress has not put there, and this the courts will not do. Admittedly Congress has no power to regulate intrastate commerce.

(4) Because said Section 10 of the Act unreasonably classifies union laborers and seeks to confer upon them privileges which are not accorded to non-union laborers, and also gives an undue preference and advantage to union laborers engaged in train operation or train service, as against union laborers otherwise employed.

The trial court overruled the demurrer of the Plaintiff in Error to the indictment, and sustained the constitutionality of Sections 1 and 10 of the Act, *supra*. The United States District Court for the Western District of Kentucky, in a similar indictment under the same sections of said Act, sustained a demurrer to the indictment, and held that the sections of the Act, *supra*, were unconstitutional and void.

This is a case within subdivisions 4 and 5, section 5 of the Judiciary Act of March 3, 1891 (4 Fed. Stats. Annotated 398), and "involves the construction or application of the Constitution of the United States," and " in which the constitutionality of any (a) law of the United States * * * * * is drawn in question," wherein the appeal

from the District Court lies direct to this Court. (American Sugar Refining Co. v. New Orleans, 181 U. S. 277; Huguley Manfg. Co. v. Galeton Cotton Mills, 184 U. S. 295). A case arises under the constitution of the United States when the right of either party depends on the validity of an Act of Congress, which is the fact in this case. (Patton v. Brady, Executrix, 184 U. S. 608).

A number of similar prosecutions are pending awaiting the decision of the questions involved in this writ of error. As we understand it the Government has been extremely anxious to have the questions involved decided by this court, and a speedy decision of the questions involved is also desired by the carriers.

BENJAMIN D. WARFIELD,
Counsel for Plaintiff in Error.

HENRY L. STONE,
SHELLEY D. ROUSE,
Of Counsel.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1906.

No. 720.

WILLIAM ADAIR, ... *Plaintiff in Error,*

versus

THE UNITED STATES OF AMERICA, ... *Defendant in Error.*

IN ERROR TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY.

BRIEF FOR PLAINTIFF IN ERROR.

BENJAMIN D. WARFIELD,
Counsel for Plaintiff in Error.

HENRY L. STONE,
Of Counsel.

John P. Morton & Company, Louisville, Ky.

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 720.

WILLIAM ADAIR, - - - - - - *Plaintiff in Error,*

vs.

THE UNITED STATES OF AMERICA, - *Defendant in Error.*

IN ERROR TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF CASE.

This is a writ of error to the United States District Court for the Eastern District of Kentucky. The plaintiff in error was indicted for alleged violation of section 10 of the Act of Congress approved June 1, 1898, entitled "An Act Concerning Carriers Engaged in Interstate Commerce, and their Employes." 30 Stat. 424, 3 U. S. Compiled Stats. (1901), pp. 3205, 3210. His demurrer to the indictment questioned the constitutionality of sections 1 and 10 of said Act. The court having overruled the demurrer, plaintiff in error was put upon his trial before United States District Judge Cochran and a jury. The jury having found the plain-

tiff in error guilty of violating the Act, the court fixed the punishment at a fine of $100. From said judgment this ~~appeal~~ writ of error is prosecuted.

The indictment contains two counts, in each of which it is alleged that at the time of the commission of the offense charged the plaintiff in error, William Adair, was master mechanic of the Louisville & Nashville Railroad Company, a common carrier engaged in interstate commerce, and one O. B. Coppage, a member of the Order of Locomotive Firemen, a labor organization, was in its employ as a locomotive fireman. The first count charged that the plaintiff in error unjustly discriminated against said Coppage because of his membership in said order by discharging him from said employment on that ground. The second count charged that the plaintiff in error threatened said Coppage with loss of employment because of his membership in said order. The plaintiff in error was convicted on the first count.

Sections 1 and 10 of the Act of Congress aforesaid are printed in full below. We wish to direct the Court's attention to the fact that while after Section 1 all of the other sections of the Act except section 10 relate to the question of *voluntary* arbitration between the employing carriers mentioned in the Act and their employes, and to trade unions, section 10 has no reference to arbitration, and is *mandatory* instead of merely voluntary or permissive. Our contention will be that section 10 is heterogeneous to the rest of the Act, while the statute without that section in it is homogeneous. While we do not assert it to be a fact, we have heard it said that the Act as originally introduced in Congress did not contain section 10, but that this section in some manner was added to the Act

subsequent to the preparation and introduction of the bill. We think that this view will be readily accepted for the reason that section 10 seems entirely out of harmony with the rest of the Act. The first and tenth sections follow:

"SEC. 1. That the provisions of this Act shall apply to any common carrier or carriers and their officers, agents, and employes, except masters of vessels and seamen, as defined in Section 4612, Revised Statutes of the United States, engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, for a continuous carriage or shipment, from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States.

"The term 'railroad' as used in this Act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement or lease; and the term 'transportation' shall include all instrumentalities of shipment or carriage.

"The term 'employes,' as used in this Act, shall include all persons actually engaged in any capacity *in train operation or train service* of any description, and notwithstanding that the *cars upon or in which they are employed* may be held and operated by the carrier under

lease or other contract: Provided, however, That this Act shall not be held to apply to employes of street railroads and shall apply only to employes *engaged in railroad train service.* In every such case the carrier shall be responsible for the acts and defaults of such employes in the same manner and to the same extent as if said cars were owned by it and said employes directly employed by it, and any provisions to the contrary of any such lease or other contract shall be binding only as between the parties thereto, and shall not affect the obligations of said carrier either to the public or to the private parties concerned." (Italics ours.)

"SEC. 10. That any employer subject to the provisions of this Act, and any officer, agent or receiver of such employer, who shall require any employe, or any person seeking employment, as a condition of such employment, to enter into an agreement, either written or verbal, not to become or remain a member of any labor corporation, association, or organization; or shall threaten any employe with loss of employment, or shall unjustly discriminate against any employe because of his membership in such a labor corporation, association, or organization; or who shall require any employe or any person seeking employment, as a condition of such employment, to enter into a contract whereby such employe or applicant for employment shall agree to contribute to any fund for charitable, social, or beneficial purposes; to release such employer from legal liability for any personal injury by reason of any benefit received from such fund beyond the proportion of the benefit arising from the employer's contribution to such fund; or who shall, after having discharged an employe, attempt or conspire

to prevent such employe from obtaining employment, or who shall, after the quitting of an employe, attempt or conspire to prevent such employe from obtaining employment, is hereby declared to be guilty of a misdemeanor, and, upon conviction thereof in any court of the United States of competent jurisdiction in the district in which such offense was committed, shall be punished for each offense by a fine of not less than one hundred dollars and not more than one thousand dollars."

SPECIFICATIONS OF ERROR.

First. The trial Court erred in overruling the demurrer to the indictment which called in question the constitutionality of sections 1 and 10 of said Act, upon the following grounds, to wit:

(a) Because section 10 is not a regulation of commerce within the meaning of the commerce clause of the Constitution of the United States.

(b) Because said section violates the Fifth Amendment to the Constitution of the United States, in that it deprives the carrier of its property without due process of law.

(c) Because by section 1 of the Act interstate and intrastate employes are so commingled that it is not possible to make it apply only to interstate employes unless the court reads into the Act something which Congress had not put there, and this the Court should not do.

(d) Because section 10 unreasonably classifies union laborers, and seeks to confer upon them privileges which are not secured to non-union laborers, and furthermore attempts to confer upon union laborers engaged in train

operation and train service, privileges which are not conferred upon union laborers engaged in any other service.

Second. The Court erred in refusing to instruct the jury in accordance with instruction No. 1, offered by plaintiff in error (R. p. 48), as follows: "The defendant moves the court to instruct the jury to find the defendant not guilty of the charges contained in each of the counts of the indictment herein."

Third. The Court erred in refusing to instruct the jury as requested in instruction No. 2, offered by the plaintiff in error, as follows:

"The court instructs the jury that although they may believe from the evidence that the defendant, William Adair, did discriminate against O. B. Coppage, by discharging him from the employment of the Louisville & Nashville Railroad Company because of his membership in a labor organization known as the Order of Locomotive Firemen, or that said Adair did threaten said Coppage with loss of employment because of his membership in said labor organization, still, the jury should find the defendant not guilty for the reason that the Act of Congress of the United States of June 1, 1898, entitled, 'An act concerning carriers engaged in interstate commerce and their employes,' is unconstitutional and void, and especially the first and tenth sections of said act, under which the indictment herein was found, are unconstitutional and void."

Fourth. The Court erred in instructing the jury, over the objection and exception of the plaintiff in error, as follows:

"Congress passed a law on the first day of June, 1898, entitled, 'An Act concerning carriers engaged in interstate commerce and their employes,' and by the tenth section of the Act it provided among other things:

"That any employer subject to the provisions thereof, and any officer, agent or receiver of such employer, who shall threaten any employe with loss of employment, or shall unjustly discriminate against any employe because of his membership in such labor corporation, association or organization, shall be guilty of a misdemeanor.

"The section makes it a misdemeanor for any employer subject to the act, or any officer or agent or receiver of such employer, to do either of two things: That is, threaten any employe with loss of employment, or unjustly discriminate against any employe because of his membership in a labor corporation, association or organization.

"Now, the kind of employer that is subject to this act is any common carrier engaged in the transportation of passengers or property wholly by rail or partly by railroad and partly by water for a continuous carriage or transportation from one State or Territory of the United States or the District of Columbia, to another State or Territory of the United States or the District of Columbia, or from any place in the United States through an adjacent portion of the country to another place in the United States, through a foreign country. For the purposes of this case such employer is any company actually engaged in interstate commerce, that is, any common carrier transporting passengers or property from one State to another. That is the kind of employer that is subject to the provisions of the act, and if it does either one of the

two things named, or any officer, agent, or receiver thereof does either of the two things, it or he is guilty of a misdemeanor.

"In this indictment that you are trying, there are two counts; that is, the defendant Adair is charged with two offenses. In the first count he is charged with the offense of unjustly discriminating against O. B. Coppage, the witness on the stand, because of his membership in the Order of Locomotive Firemen, a labor organization; and in the second count he is charged with the offense of threatening him with the loss of employment because of such membership. In order that the defendant may be guilty of the offense charged in the first count of the indictment it is essential that you should believe from the evidence these things: That the defendant was the Master Mechanic of the Louisville & Nashville Railroad Company at the time of the doing of the things complained of; that the Louisville & Nashville Railroad Company was a common carrier engaged in interstate commerce at that time; that the witness, O. B. Coppage, was in the defendant's employ as a fireman and engaged in interstate commerce, and was a member of the Order of Locomotive Firemen, a labor organization, and then that the defendant, William Adair, unjustly discriminated against him because of his membership in such labor organization.

"Those are the facts that make up and constitute the offense charged in the first count; so that if you find those facts beyond a reasonable doubt, it is your duty to find the defendant guilty; but unless you so find beyond a reasonable doubt, then you must find the defendant not guilty.

"I will say that if the defendant on the occasion testified in evidence discharged the witness Coppage from his employment because of such membership, if that was the reason and motive for the discharge, then you would be authorized under the evidence to find that he unjustly discriminated against him because of such membership.

"In the second count of the indictment the facts making up the offense charged are, with one exception, the same as in the first count; that is, that the defendant, William Adair, at the time of the doing of the things complained of, was Master Mechanic of the Louisville & Nashville Railroad Company; that the Louisville & Nashville Railroad Company was a common carrier engaged in interstate commerce; that the witness, O. B. Coppage, was in its employ as a fireman and himself engaged in interstate commerce—and was also a member of the Order of Locomotive Firemen, a labor organization, and, lastly, that the defendant, William Adair, threatened him with loss of employment because of his membership in such organization.

"Now, gentlemen, under the evidence, as I view it, it is not possible for you to find the defendant guilty of both of the offenses charged. You can only find him guilty of one, and which one you can find him guilty of depends upon how you view the transaction that took place on the 21st day of October, 1903, as testified to by the witnesses. If you believe from the evidence beyond a reasonable doubt that that was an actual discharge of O. B. Coppage, by the defendant, it is your duty to find him guilty under the first count, if you believe beyond a reasonable doubt that all the other facts existed. This count charges him with unjustly discriminating against the witness be-

cause of his membership in the labor organization, and that he did so by discharging him.

"If, however, your view of the transaction is that it was simply a threat of loss of employment because of his membership, and you believe beyond a reasonable doubt that and the other facts, it is your duty to find him guilty under the second count.

"I will leave it for you to determine what was the nature of the transaction. If it was actual discharge by defendant, and you find that beyond a reasonable doubt, and the other facts in like manner, then it is your duty to find the defendant guilty under the first count. If, however, it was no more than a threat of loss of employment because of such membership, then it was (is) your duty to find him guilty under the second count.

"I think I should say to you, gentlemen, that you have nothing to do with the policy of such legislation. That is a matter for Congress to determine. The sole thing for you to determine is whether or not the defendant has been guilty of the things charged in the indictment to which I have drawn your attention."

Fifth. The Court erred in overruling the motion of plaintiff in error in arrest of judgment.

Sixth. The Court erred in overruling the motion of plaintiff in error for a new trial.

We contend in behalf of plaintiff in error that the sections above quoted are unconstitutional and void, and that the trial judge erred to the great prejudice of plaintiff in error in not sustaining, on that ground, the demurrer to the indictment, and also erred in the other respects assigned. In our argument we will primarily argue the questions as of first impression, without reference to the opinions of Judge Evans in United States v. Scott, 148 Fed. 431, in which he held those sections to be unconstitutional in a case similar to this one, and of Judge Cochran at nisi prius in this case, 152 Fed. 737. Afterwards we will discuss the question in the light of those two opinions.

The power which Congress has is *to regulate commerce*. There is a marked distinction between a power to regulate commerce and a power to regulate the affairs of an individual or corporation engaged in such commerce.

It is not competent for Congress to declare that to be an offense or crime if committed in a State which is not a crime under the Constitution and laws of that State, unless the Act be passed in the necessary promotion or execution of some Federal power which the Federal government has the right to execute.

We maintain that the right of a common carrier to select its own employes is absolutely essential to the proper discharge of its public duties. It is of the utmost importance that these men shall owe and shall recognize an allegiance to the carrier's interests above allegiance to any other organization and subject only to the law of the land. It is the theory of the statute that carriers can be prevented from discharging or threatening with

discharge, or interfering in any way with men who belong to a union, even though those men by the very terms of their iron-clad oaths are bound to render first allegiance to their union, and, if necessary, betray the interests of the carrier they have undertaken to serve. Many things that are of the most vital importance to the carrier's interests they can not do, if forbidden by the organization, and, in a word, the necessary loyalty of the employes to the employer is utterly destroyed by the obligation and oath which they take to their union, which claims their first allegiance and obedience.

Now, we concede that if it be necessary to carry out and enforce a Federal power properly granted, and within the scope of the authority delegated to the Federal government, that this Act might be upheld, but how can it be reasonably contended that it is a burden upon, or a regulation of, or interference with interstate commerce to allow a common carrier to select its own employes, or to exclude from its employment persons whose loyalty to the company, in the opinion of the employer, is seriously impaired, if not destroyed, by their prior allegiance to their labor unions, unless it can be shown that the giving to the employer of the exclusive right to select its own employes (it being exclusively responsible for their acts) directly interferes with, or is a burden upon, or a regulation of interstate commerce? If Congress had the power to enact Section 10, *supra*, that power must have been derived from Article 1, Section 8, Subsection 3, of the Constitution of the United States, which gives Congress power "To regulate commerce . . . among the several States." Unless the power is so derived it does not exist. Is the legislation under investigation a "regulation" of commerce? We earnestly insist it is not, and

both for this reason, and for other reasons hereinafter to be noticed, that Section 10, *supra*, is unconstitutional and void, and, if so, the demurrer to the indictment should have been sustained and the trial court erred in refusing to sustain it.

We contend that Section 10 is unconstitutional and void:

(1) Because it is not a regulation of commerce, within the meaning of the commerce clause of the Constitution of the United States;

(2) Because it violates the fifth amendment to said Constitution in that it deprives the carrier of its property without due process of law;

(3) Because it unreasonably classifies union laborers and seeks to confer upon them privileges which are not accorded to non-union laborers, and, furthermore, attempts to confer upon union laborers engaged "in train operation or train service," privileges which are not conferred upon union laborers engaged in any other service;

And we contend that Section 1 is void:

(4) Because interstate and intrastate employes are so commingled therein that it is not possible to make it apply only to interstate employes unless the Court reads into the Act something which Congress has not put there, and this the Court will not do.

I.

If Sec. 10 affects commerce at all, it only does so obliquely, remotely, indirectly and collaterally. This honorable Court has declared many times, and in many cases, that to constitute a regulation of commerce within the meaning of the commerce clause of the Constitution the

regulation *must be direct and substantial, and not merely indirect, remote, incidental, and collateral.* Therefore we contend that Section 10 was not within the power of Congress to enact.

In support of our position that if said section affects commerce at all, it only does so indirectly, remotely, incidentally or collaterally, and hence is not within the commerce clause of the Constitution, we will notice, together, two lines of decisions of this Court, one line consisting of cases in which the application of the Anti-Trust Act of July 2, 1890, was involved, and the other line consisting of decisions of this court to the effect that certain State legislation was not an encroachment on the commerce power of Congress and hence was valid.

In Addyston Pipe & Steel Co. v. United States, 175 U. S., p. 211, a contract which sought to prevent competition in the manufacture and sale of iron pipe was held to be a *direct and substantial regulation of commerce,* and therefore repugnant to the Constitution and to the Anti-Trust Act. Let us note the frequency with which the Court, in that opinion, reiterates the declaration that in order to constitute a regulation of commerce the effect thereupon *must be direct and not collateral.* In discussing the commerce clause of the Constitution (p. 228) this language is used (the italics are ours):

"Under this grant of power to Congress, that body, in our judgment, may enact such legislation as shall declare void and prohibit the performance of any contract between individuals or corporations where the *natural and direct* effect of such a contract will be, when carried out, *to directly, and not as a mere incident to other and innocent purposes, regulate to any substantial extent interstate commerce.*"

Again (p. 229):

"We think the provision regarding the liberty of the citizen is, to some extent, limited by the commerce clause of the Constitution, and that the power of Congress to regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into those private contracts *which directly and substantially, and not merely indirectly, remotely, incidentally, and collaterally,* regulate to a greater or less degree commerce among the States."

Again, on same page:

"We fail to find in the language of the grant any such limitation of that power as would exclude Congress from legislating on the subject and prohibiting those private contracts which would *directly and substantially, and not as a mere incident,* regulate interstate commerce. If certain kinds of private contracts *do directly,* as already stated, *limit or restrain, and hence regulate* interstate commerce, why should not the power of Congress reach those contracts," etc.

Again (p. 234), the court, in referring to what was decided in Railroad Company v. Richmond, 19 Wall. 584, 589, said:

"There was no intimation * * * that Congress has no power to legislate regarding those contracts *which do directly regulate and restrain interstate commerce.* The inference is quite the reverse, and it is plain that the case assumes if private contracts when entered into do *directly* interfere with and regulate interstate commerce, Congress has power to condemn them. If the *necessary,*

direct, and immediate effect of the contract be to violate an act of Congress, *and also to restrain and regulate interstate commerce,* it is manifestly immaterial whether the design to so regulate was or was not in existence when the contract was entered into. *The fact of a direct and substantial regulation* is the important part of the contract, and that regulation existing, it is unimportant that it was not designed. Where the contract affects interstate commerce *only incidentally and not directly,* the fact that it was not designed or intended to affect such commerce is simply an additional reason for holding the contract valid and not touched by the act of Congress. * * * We conclude that the plain language of the grant to Congress of power to regulate commerce among the several States includes power to legislate upon the subject of those contracts in respect to interstate or foreign commerce *which directly affect and regulate that commerce.*"

Again (p. 235):

"We are thus brought to the question whether the contract or combination proved in this case is one which is either *a direct restraint or a regulation* of commerce among the several States," etc.

Again (p. 240):

"We think the case now before us involves contracts of the nature last above mentioned, *not incidentally or collaterally, but as a direct and immediate result* of the combination engaged in by the defendants. * * * The *direct and immediate* result of the combination was therefore necessarily a restraint upon interstate commerce."

Again (p. 241):

"As pertinently asked by the court below, was not this a *direct restraint* upon interstate commerce in these goods? * * * If, therefore, an agreement or combination *directly restrains* not alone the manufacture, but the purchase, sale or exchange of the manufactured commodity among the several States, it is brought within the provisions of the statute."

Again (p. 243):

"The combination thus had a *direct, immediate, and intended relation* to and effect upon the subsequent contract to sell and deliver the pipe."

Again (p. 244), in referring to what was held in Hopkins v. United States, 171 U. S. 578, and Anderson v. United States, *Ib.* 604, the Court said:

"It was said that when it is seen that the agreement entered into does not *directly* relate to and act upon and embrace interstate commerce, and that it was executed for another and entirely different purpose, and that it was calculated to attain it, the agreement would be upheld, *if its effect upon that commerce was only indirect and incidental.*"

Could this Court have made clearer by any language it could have used, that it is only with respect to those things which have a *direct, immediate,* and *substantial* effect upon interstate commerce that Congress has power to legislate? And is it not equally clear that the legislation now under consideration does not have either a *direct,* or an *immediate,* or a *substantial* effect upon such

commerce? It is merely an attempt by Congress to regulate the private relations between master and servant; and that not with respect to all masters and all servants, but it bears unequally upon only one class of masters, and in favor of only one class of such master's servants—to wit: those who are members of labor unions.

To the same effect as the Addyston Pipe case, *supra*, see Hopkins v. United States, 171 U. S. 578; United State v. E. C. Knight Co., 156 U. S. 1; Hooper v. California, 105 U. S. 648, 654; Williams v. Fears, 179 U. S. 270, 278; Munn v. Illinois, 94 U. S. 113; Mugler v. Kansas, 123 U. S. 623, 661.

In L. & N. R. Co. v. Ky., 161 U. S. 677, the Court affirmed the judgment of the Court of Appeals of Kentucky, whereby the Louisville & Nashville Railroad Company, an interstate carrier, was forbidden to acquire the parallel and competing railroad of the Chesapeake, Ohio, & Southwestern Railroad Company, also an interstate carrier. A provision of the Constitution of Kentucky forbade the consolidation of such lines of railroad. The Court held the provision of the Constitution of Kentucky to be a valid exercise of police power by the State, and not repugnant to the commerce clause of the Constitution of the United States, and that whatever is contrary to public policy or inimical to the public interests is subject to the police power of the State, and is within its legislative control.

In Smith v. Alabama, 124 U. S. 465, an Alabama statute requiring locomotive engineers to be licensed in that State was held not to be a regulation of interstate commerce, although the license was required of engineers

hauling interstate trains. The Court quoted from Sherlock v. Alling, 93 U. S. 102, where it was said:

"In conferring upon Congress the regulation of commerce it was never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation *might indirectly affect* the commerce of the country. *Legislation, in a variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution,*"

and held that the provisions of the Alabama Engineers' License Act were not regulations of interstate commerce, and that so far as the act affected transactions of commerce among the States, it did so *indirectly, incidentally, and remotely,* and not so as to burden and impede them. The Court held similarly in Nashville, etc., R'y v. Alabama, 128 U. S. 96, with reference to a statute of Alabama requiring certain railroad employes to be examined for color blindness and defective vision, and which statute was held to apply to all such employes within the State, whether engaged in interstate or intrastate commerce.

In L. S. & M. S. R. Co. v. Smith, 173 U. S. 684, it was held that a statute of Michigan requiring railroad companies to issue 1,000-mile tickets at not exceeding $20 in the lower peninsula of Michigan and at not exceeding $25 in the upper peninsula, violated the provision of the Constitution of the United States which prohibits the taking of property without due process of law, etc. The Court, after discussing the doctrine that before State leg-

islation can be held invalid under the commerce clause of the Constitution, its effect upon interstate commerce must be *immediate, and not merely incidental, secondary, and remote,* used this language:

"A railroad company, although a *quasi* public corporation, and although it operates a public highway, Cherokee Nation v. Southern Kansas R'y, 135 U. S. 641, Lake Shore, etc., R'y Co. v. Ohio, 173 U. S. 285, 301, has nevertheless rights which the Legislature can not take away without a violation of the Federal Constitution, as stated in Smith v. Ames, 169 U. S. 466, 544. A corporation is a person within the protection of the Fourteenth Amendment. Minneapolis & St. Louis R'y v. Beckwith, 129 U. S. 26; Smyth v. Ames, 169 U. S. 466, 522, 526. Although it is under governmental control, that control must be exercised with due regard to constitutional guarantees for the protection of its property."

And again the court said:

"It thus invades the general right of a company to conduct and manage its own affairs, and compels it to give the use of its property for less than the general rate to those who come within the provisions of the statute, and to that extent it would seem that the statute takes the property of the company without due process of law."

And again:

"If the Legislature can interfere by directing the sale of tickets at less than the generally established rate, it can compel the company to carry certain persons or classes free. If the maximum rates are too high in the judgment of the Legislature, it may lower them, provided

they do not make them unreasonably low as that term is understood in the law; but it can not enact a law making maximum rates, and then proceed to make exceptions to it in favor of such persons or classes as in the legislative judgment or caprice may seem proper. What right has the Legislature to take from the company the compensation it would otherwise receive for the use of its property in transporting an individual or classes of persons over its road, and compel it to transport them free or for a less sum than is provided for by the general law? Does not such an act, if enforced, take the property of the company without due process of law? We are convinced that the Legislature can not thus interfere with the conduct of the affairs of corporations."

And again:

"What the company may choose voluntarily to do furnishes no criterion for the measurement of the power of a Legislature. Persons may voluntarily contract to do what no Legislature would have the right to compel them to do. Nor does it furnish a standard by which to measure the reasonableness of the matter exacted by the Legislature. The action of the company upon its own volition, purely as a matter of internal administration, and in regard to the details of its business which it has the right to change at any moment, furnishes no argument for the existence of a power in a Legislature to pass a statute in relation to the same business imposing additional burdens upon the company."

In the same connection see Wisconsin, etc., R. Co. v. Jacobson, 179 U. S. 287.

In Hennington v. Georgia, 163 U. S. 299, the Court upheld a statute of Georgia forbidding the running of freight trains in that State on the Sabbath day. The statute applied alike to interstate and intrastate trains, and it was held that this was a valid exercise of the police power of the State, even though it affected commerce among the States.

All that was decided in U. S. v. Joint Traffic Assn., 171 U. S. 505, and in U. S. v. Trans-Missouri Freight Assn., 166 U. S. 299, was that Congress, with regard to interstate commerce, and in the course of regulating it in the case of railroad corporations, has the power to say that no contract or combination shall be legal which shall restrain trade and commerce by shutting out the operation of the general laws of competition. The contracts which were declared against in the two cases last referred to, and in the Addyston Pipe case, would have been illegal at common law. Northern Securities Co. v. U. S., 193 U. S. 197, expresses the same idea as the Addyston Pipe case, that it is only that which *directly or necessarily* operates in restraint of trade or commerce among the several States, or with foreign nations, that is condemned by the Anti-Trust Act, under the commerce clause of the Constitution.

In re Greene, 52 Fed. 104, Judge Jackson, afterwards a member of this Court, used this language:

"Contracts in restraint of trade, while unlawful, were not misdemeanors or indictable at common law. * * * But Congress certainly has not the power or authority under the commerce clause, or any other provision of the Constitution, to limit and restrict the right of corporations

created by the States, or the citizens of the States, in the acquisition, control, and disposition of property. Neither can Congress regulate or prescribe the price or prices at which such property, or the products thereof, shall be sold by the owner or owners, whether corporations or individuals. It is equally clear that Congress has no jurisdiction over, and can not make criminal, the aims, purposes and intentions of persons in the acquisition and control of property, which the States of their residence or creation sanction and permit."

In Swift & Co. v. U. S., 196 U. S. on page 397, the Court, in characterizing the restraint of trade which was condemned in that opinion, says:

"Its effect upon commerce among the States *is not incidental, secondary, remote, or merely probable.*"

The Court distinguished the Swift case from the Hopkins case, 171 U. S. 578, saying as to the latter:

"There again the effect of the combination of brokers upon the commerce was only *indirect* and not within the act."

In Hopkins v. U. S., 171 U. S. 578, the Kansas City Live Stock Exchange was held not to be doing business in violation of the Anti-Trust Act, for the reason that their business did not constitute or amount to interstate commerce, within the meaning of the Constitution or laws of the United States; that it was a business which was an aid or facility to commerce, and if it affected interstate commerce at all it did so only *in an indirect and*

incidental manner. The Court further declared "there must be some *direct* and *immediate* effect upon interstate commerce, in order to come within the act."

Similar language is used in U. S. v. E. C. Knight Co., 156 U. S. 1, *supra*, where it was held that the consolidation of the largest sugar refineries of the country into the Sugar Trust was not violative of the commerce clause of the Constitution, for the reason that the manufacturing or refining of sugar was not commerce, and that it did not become so until the transportation thereof was actually begun. On page 13 the Court used this language:

"It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnished the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne than the risk be run in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality."

In Escanaba Co. v. Chicago, 107 U. S. 678, 687, it was said:

"The commercial power of Congress is exclusive of State authority only when the subjects upon which it is exercised are national in their character, and admit and require uniformity of regulation affecting alike all the States."

Sherlock et al. v. Alling, 93 U. S. 99, was an action to recover damages for the death of a steamboat passenger on the Ohio River as the result of a collision between two boats. The administrator of decedent sought to recover damages in one of the Common Pleas courts of Indiana under a statute of that State which provided a right of recovery in such cases. The steamboat company defended upon the ground that the question of its liability was to be determined exclusively by the navigation laws of the United States. The Court called attention to the fact that in all of the cases in which it had condemned such legislation because it *interfered* with interstate commerce, that such legislation operated *directly* upon commerce, and that "in conferring upon Congress the regulation of commerce it was never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might *indirectly* affect the commerce of the country. Legislation in a great variety of ways may affect commerce and persons engaged in it, without constituting a regulation of it, within the meaning of the Constitution."

In Veazie and Young v. Moor, 14 Howard, 567, in discussing the power conferred on Congress by the commerce clause of the Constitution, the Court said:

"The design and object of that power, as evinced by the history of the Constitution, was to establish a perfect equality amongst the several States as to commercial rights, and to prevent unjust and invidious distinctions, which local jealousies, or local and partial interests might be disposed to introduce and maintain. These

were the views pressed upon the public attention by the advocates of the adoption of the Constitution, and in accordance therewith have been the expositions of this instrument propounded by this court, in decisions quoted by counsel on either side of this cause, though differently applied by them."

In C., M. & St. P. R'y v. Sloan, 169 U. S. 133, in upholding a State statute which its opponents claimed contravened the commerce clause of the Federal Constitution, the Court said:

"It is equally within the power of the State to prescribe the safeguards and precautions foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries, which, after they have been inflicted, the State has the power to redress and punish. The rules prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property otherwise endangered by their use, are strictly within the scope of the local law."

We think it most significant that when State legislation has been attacked in this Court as violative of the Constitution of the United States (a) because it required an express company to be licensed by the State in order that it might carry on an intrastate business (Osborne v. Florida, 164 U. S. 650), or (b) because it taxed the Pullman Company for carrying on an intrastate business (Pullman Company v. Adams, 189 U. S. 420), or (c) because it taxed a railroad company on its cab service (Pennsylvania R. Co. v. Knight, 192 U. S. 21), or (d) because it required separate coaches for the races (Hall

v. DeCuir, 95 U. S. 485, and various other cases), or (e) because it required trains to stop at certain stations (Gladson v. Minnesota, 166 U. S. 430, and various other cases), or (f) because it required engineers to be licensed (Smith v. Alabama, 124 U. S. 465), or (g) because it required engineers to be examined for color blindness (Nashville R'y v. Alabama, 128 U. S. 96), the argument of counsel and opinion of Court have been at once directed to the consideration of the commerce clause of the Constitution.

On the other hand, when State legislation has been attacked in this Court as invalid (a) because it altered the rule of fellow servant (Missouri R'y Co. v. Mackey, 127 U. S. 106, and various other cases), or (b) because it rendered a railroad company liable for stock killed on account of failure to fence (M. P. R'y Co. v. Humes, 115 U. S. 513), or (c) because it rendered a railroad company liable for fire set without negligence (S. L. & S. F. R. Co. v. Mathews, 165 U. S. 1), in no one of the cases, although all these laws were general in their nature, and applicable to intrastate as well as interstate commerce, has the argument of counsel or opinion of Court so much as hinted that these matters have any sort of relation to the commerce clause. Repeating the language of the Constitution, "Congress shall have power to regulate commerce with foreign nations and among the several States and with the Indian tribes," in Gibbons v. Ogden, 9 Wheat. 189, Chief Justice Marshall said:

"Commerce undoubtedly is traffic, but it is something more; it is intercourse; it describes the commercial intercourse between nations and parts of nations in all its

branches, and is regulated by prescribing rules for carrying on that intercourse."

When cases have come to this Court involving the question whether a particular State law is a regulation of interstate commerce, the question has been, Does the State law put a burden on interstate traffic? Examples of these cases are found in Brown v. Maryland, 12 Wheat. 420; Leisy v. Hardin, 135 U. S. 100; Robbins v. Taxing District of Shelby, 120 U. S. 489.

Or the question has been, Does the State law place a burden on interstate transportation? Examples of this class are found in Gibbons v. Ogden, 9 Wheat. 1; Crandall v. Nevada, 6 Wall. 35; Wabash R. Co. v. Illinois, 118 U. S. 557.

Extending the quotation which we have just made from 9 Wheaton, 189, we find:

"The subject to be regulated is commerce, and our Constitution being, as was aptly said at the bar, one of enumeration and not of definition, to ascertain the extent of the power it becomes necessary to settle the meaning of the word."

Again, at page 196:

"What is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed."

So far, then, as we can derive a definition from this case, it would seem that commerce "is regulated by prescribing rules for carrying on that intercourse," and the power to regulate commerce is the pow-

er "to prescribe the rule by which commerce is to be governed."

Does the Act under consideration prescribe any rule as to traffic or transportation? No rule whatever is laid down. The carrier is not required, while engaged in interstate commerce or not so engaged, to conduct his business in any particular way. There are no regulations to which the carrier is required to conform, or failing in obedience to which he is to be rendered liable in a civil or a criminal forum. The Act is simply a bold attempt to regulate one of the ordinary relations of life, that of master and servant, a relation hitherto supposed to be entirely within the control of the State.

If this Act is a regulation of commerce, an act providing how one engaged in interstate commerce can employ a minor, with or without the consent of his parent or guardian; under what regulation; at what age; and in what character of employment, is equally a regulation of interstate commerce. None of these are rules for carrying on interstate intercourse, or rules by which commerce is to be governed. We contend, therefore, that Congress can not enact laws as to the ordinary relations of life, such as parent and child, master and servant, guardian and ward, or to determine the obligations and liabilities of these relations.

We have cited and quoted from, thus fully, the opinions of the Court upon the question as to what constitutes a regulation of commerce, within the power of Congress under the commerce clause of the Constitution, in order to show that Sec. 10 of the Act of June 1, 1898, was wholly beyond the power of Congress to enact because it does not *directly and immediately* affect interstate com-

merce. It was urged by brief and in oral argument by counsel for the Government in the District Court, and will doubtless be so argued here, that the object which Congress had in view in enacting the section was to prevent the interruption of interstate commerce, as a result of strikes, and that such strikes were only apt to assume serious proportions where the employes were members of labor organizations. The report of the Strike Commission upon the railroad strike at Chicago in June-July, 1894 (In re Debs, *post*), was referred to by counsel as the cause leading up to the enactment of the Act. Whatever may have been the reason for the enactment, we earnestly insist that the requisites essential to invest Congress with power to enact legislation under the commerce clause of the Constitution were wholly lacking with respect to Sec. 10. As to whether or not, if the section should be upheld, it would have the effect which counsel express the opinion it was intended to have, is purely speculative. The most that can possibly be predicted for such legislation is that it would probably have such effect. We do not believe it would even probably have such effect. But, even so, that is not enough to sustain the legislation. In order to sustain it under the commerce clause of the Constitution it is necessary that it should *directly and immediately* have the effect which is claimed for it, and not *incidentally, secondarily, remotely or merely probably* have such effect. (Swift & Co. v. U. S., 196 U. S. on p. 397, *supra.*) The argument of counsel comes to this: If the carriers do not employ union labor, and do not permit such labor to do just as it pleases to do, strikes are apt to result, and when this happens commerce is apt to be interrupted; *ergo,* the carrier should

not be permitted to exercise any free will in the matter of whether or not it will employ union labor; but must do so, *nolens volens*, for fear that if it does not employ laborers so organized their organizations will bring about strikes and these will interrupt interstate commerce. Could any position be more untenable? What constitutional warrant is to be found for extending such special indulgence to organized labor, at the expense of the rights of the public, of employers of labor, and of non-union laborers? The argument assumes that if organized labor brings about a railroad strike that the carrier will not be able to move interstate commerce and that therefore it will be interrupted. This is a violent assumption. Why assume that the carriers can not do that which they have done in the past in dealing with strikes, to wit: promptly fill the places of the strikers with other laborers equally skillful? Congress certainly had no right to assume that this could not, and would not, be done. We do not think such argument can be better answered than in the language of the Supreme Court of Wisconsin in State *ex rel.* Zillmer, Sheriff, v. Kreutzberg, 90 N. W. 1098, *post*, when it said:

"One menace to public welfare was suggested by counsel for plaintiff in error, based upon the assertion that discharges of employes, especially union men, are likely to be followed by turbulence, violence, and even bloodshed; hence that it was proper to deprive employers of their rights, presumably because they are ordinarily law-abiding, and will not make trouble. We decline to acknowledge as a fact that the laboring men, as a class, union or non-union, are more prone to lawbreaking or

violence than other classes of the community, or to adopt the theory that the Legislature so assumed. But even if that assumption were made, it would constitute no justification for depriving one man of his liberty of contract, that another was likely to commit crimes or breaches of the peace. As well deny the right of private ownership of chattels because they tempt the thief to steal. Neither the restriction imposed nor the penalty is at all relevant to the public purpose sought, nor to the wrongful acts threatened. * * * We hold that freedom to make, and even more to refuse to make, contracts, whereby no rights of others suffer, can not be restricted, unless otherwise will result substantial disturbance of the public health, safety, or welfare, and that even a possible tendency of some persons to wrongfully disturb the peace when thwarted of their will constitutes no justification for restraining others of their just right; nor, if so, is the present act at all calculated or reasonably necessary to prevent the only suggested menace to the community. As the legislation, clearly and beyond doubt, invades the natural liberty of the individual, it must be void, unless we can discover both the existence of a public need, and at least tendency of the statute to provide therefor. In the search for such need and purpose we must and do concede to the legislative branch of the Government the fullest exercise of discretion within the realm of reason, and, if a public purpose can be conceived which might rationally be deemed to justify the act, the court can not further weigh the adequacy of the need or the wisdom of the method. When, however, after all diligence and reflection, we are unable to discover any such public need or purpose, we have no alternative conclusion save that

the Legislature has, under the guise of protecting public interests, arbitrarily interfered with private business, and imposed unusual and unnecessary restrictions upon lawful occupations, which it may not do. Lawton v. Steele, 152 U. S. 133. It has, then, taken from one his liberty and property, not for a public purpose, but for the benefit of other individuals, which is but robbery under the forms of law. Citizens Savings & Loan Assn. v. City of Topeka, 20 Wall. 655, 664."

In re Debs, Petitioner, 158 U. S. 564, 581, it is said:

"It is curious to note the fact that in a large proportion of the cases in respect to interstate commerce brought to this court the question presented was of the validity of State legislation in its bearing upon interstate commerce, and the uniform course of decision has been to declare that it is not within the competency of a State to legislate in such a manner as to obstruct interstate commerce. If a State with its recognized powers of sovereignty is impotent to obstruct interstate commerce, can it be that any mere voluntary association of individuals within the limits of that State has a power which the State itself does not possess?"

Opposing counsel also devoted considerable attention, both in brief and oral argument at nisi prius, to the history of the causes resulting in the enactment of the Act of June 1, 1898, and, in oral argument at least, stated that Sec. 10, together with the rest of the Act, was recommended by the Chicago Strike Commission as proper legislation by Congress. In this counsel was mistaken. In the document from which he read and upon which he

relied, to wit: "Report on the Chicago strike of June-July, 1894, by the United States Strike Commission," etc., on page 52, this language is used:

"As authorized by statute, the commission has decided upon certain recommendations and certain suggestions, growing out of the study of the Chicago strike and boycott. These recommendations and suggestions are upon *three* lines: First, for Congressional action; second, *for State* action; and third, for the action of corporations and labor organizations."

Then follow, under the first heading, suggestions with respect to Congress creating a permanent United States Strike Commission, and enacting an arbitration act.

With respect to the second heading, concerning recommendations *for State action*, the report says (p. 54):

"(1) The commission would suggest the consideration by the States of the adopting of some system of conciliation and arbitration," etc.

"(2) Contracts requiring men to agree not to join labor organizations or to leave them, as conditions of employment, should be made illegal, as is already done in some other States."

Therefore, so far from the strike commission's having recommended Congressional legislation along the lines of Sec. 10, that commission distinctly recognized that such legislation was not competent for Congress to enact, and therefore recommended that such legislation be enacted by the several States. As a matter of fact, as we shall hereinafter see, such legislation is not constitutional even when enacted by State Legislatures, which

inherently possess all powers of legislation not conferred upon the general Government by the Federal Constitution or taken away by State Constitutions. Therefore, to the extent that the opinion and recommendations of the Strike Commission have any value upon this point they fortify our position that Congress had no power to enact Sec. 10, and correspondingly refute the position which opposing counsel sought to sustain by them.

We have shown, from repeated utterances of this court, that in order to constitute a regulation of commerce, within the power of Congress, that the legislation must have a *direct*, and not merely an indirect, secondary, collateral, or remote effect upon interstate commerce. We have also endeavored to show that when brought to such test Sec. 10 must fall, because if it affects commerce at all, its effect is only *indirect, collateral, remote, possible or probable.*

Counsel for the government will doubtless argue that Congress has power to regulate the relations between a common carrier by land and its servants because this court has upheld legislation having or tending to have such effect by virtue of the Harter Act and other Acts of Congress, having reference to water transportation. It is well to bear in mind the clear cut differentiation between the power of Congress over carriers by land and water carriers, though it must be admitted that even this honorable court does not seem to have always kept the distinction clearly in view. As to water carriers Congress has power to legislate not only under the commerce clause of the Constitution but under the judicial clause of the Constitution (Act. 2, Sec. 3) as to which it

has been held that the power of Congress to legislate is both plenary and exclusive.

The difference between the legislative power conferred upon Congress, and the judicial power conferred upon this Court and the inferior courts of the United States, is clearly and ably pointed out in Kansas v. Colorado, 27 Supreme Court Reporter, on p. 661.

The Court there held that Congress was without authority to enact legislation looking to the reclamation of arid lands, not the property of the United States or situated within the limits of a Territory. On behalf of the Government it was contended that the rights of the two States *inter sese* to the waters of the Arkansas River were subordinate to a superior right on the part of the national government to control the whole system of the reclamation of arid lands. The Court refused to acquiesce in the soundness of the Government's contention, and said:

"That involves the question whether the reclamation of arid lands is one of the powers granted to the general government. As heretofore stated, the constant declaration of this court from the beginning is that this government is one of enumerated powers. 'The Government, then, of the United States, can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given or given by necessary implication.' Story, J., in Martin v. Hunter, 1 Wheat. 304, 326, 4 L. ed. 97, 102. 'The government of the United States is one of delegated, limited, and enumerated powers.' United States v. Harris, 106 U. S. 629, 635, 27 L. ed. 290, 292, 1 Sup. Ct. Rep. 601, 606.

"Turning to the enumeration of the powers, granted to Congress by the 8th section of the 1st article of the Constitution, it is enough to say that no one of them, by any implication, refers to the reclamation of arid lands. The last paragraph of the section which authorizes Congress to make all laws which shall be necessary or proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof, is not the delegation of a new and independent power, but simply provision for making effective the powers theretofore mentioned. The construction of that paragraph was precisely stated by Chief Justice Marshall in these words (4 Wheat. 421, 4 L. ed. 605): 'We think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional,' —a statement which has become the settled rule of construction. From this and other declarations it is clear that the Constitution is not to be construed technically and narrowly, as an indictment, or even as a grant presumably against the interest of the grantor, and passing only that which is clearly included within its language, but as creating a system of government whose provisions are designed to make effective and operative all the gov-

ernmental powers granted. Yet, while so construed, it still is true that no independent and unmentioned power passes to the national government or can rightfully be exercised by the Congress." Further along the court said as to Section 3 of Article 4 of the Constitution: "But clearly it does not grant to Congress any legislative control over the States, and must, so far as they are concerned, be limited to authority over the property belonging to the United States within their limits. Appreciating the force of this, counsel for the Government relies upon 'the doctrine of sovereign and inherent power;' adding, 'I am aware that in advancing this doctrine I seem to challenge great decisions of the court, and I speak with deference.' His argument runs substantially along this line: All legislative power must be vested in either the State or the national government; no legislative powers belong to a State government other than those which affect solely the internal affairs of that State; consequently all powers which are national in their scope must be found vested in the Congress of the United States. But the proposition that there are legislative powers affecting the nation as a whole which belong to, although not expressed in the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the Amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the Constitution is made absolutely certain by the 10th Amendment. This Amendment, which was seemingly adopted with prescience of

just such contention as the present, disclosed the widespread fear that the national government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if, in the future, further powers seemed necessary, they should be granted by the people in the manner they had provided for amending that act. It reads: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' The argument of counsel ignores the principal factor in this article, to wit, 'the people.' Its principal purpose was not the distribution of power between the United States and the States, but a reservation to the people of all powers not granted. The preamble of the Constitution declares who framed it,—'we, the people of the United States,' not the people of one State, but the people of all the States; and Article 10 reserves to the people of all the States the powers not delegated to the United States. The powers affecting the internal affairs of the States not granted to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, and all powers of a national character which are not delegated to the national government by the Constitution are reserved to the people of the United States. The people who adopted the Constitution knew that in the nature of things they could not foresee all the questions which might arise in the future, all the circumstances which might call for the exercise of further national powers than those granted to the United States,

and, after making provision for an amendment to the Constitution by which any needed additional powers would be granted, they reserved to themselves all powers not so delegated. This Article 10 is not to be shorn of its meaning by any narrow or technical construction, but is to be considered fairly and liberally so as to give effect to its scope and meaning. As we said, construing an express limitation on the powers of Congress, in Fairbank v. United States, 181 U. S. 283, 288, 45 L. ed. 862, 865, 21 Sup. Ct. Rep. 648, 650:

" 'We are not here confronted with a question of the extent of the powers of Congress, but one of the limitations imposed by the Constitution on its action, and it seems to us clear that the same rule and spirit of construction must also be recognized. If powers granted are to be taken as broadly granted and as carrying with them authority to pass those acts which may be reasonably necessary to carry them into full execution; in other words, if the Constitution in its grant of powers is to be so construed that Congress shall be able to carry into full effect the powers granted, it is equally imperative that, where prohibition or limitation is placed upon the power of Congress, that prohibition or limitation should be enforced in its spirit and to its entirety. It would be a strange rule of construction that language granting powers is to be liberally construed, and that language of restriction is to be narrowly and technically construed. Especially is this true when, in respect to grants of powers, there is, as heretofore noticed, the help found in the last clause of the eighth section, and no such helping clause in respect to prohibitions and limitations. The true spirit of constitutional interpretation in both direc-

tions is to give full, liberal construction to the language, aiming ever to show fidelity to the spirit and purpose.' ''

THE DIFFERENCE BETWEEN THE POWER OF CONGRESS OVER LAND TRANSPORTATION AND WATER TRANSPORTATION.

In re Garnett *et al.*, 141 U. S. 1, points out the difference between the power of Congress over land transportation and its power over water transportation in this language:

''It is unnecessary to invoke the power given to Congress to regulate commerce with foreign nations, and among the several States, in order to find authority to pass the law in question. The act of Congress which limits the liability of ship owners was passed in amendment of the maritime law of the country, and the power to make such amendments is co-extensive with that law. It is not confined to the boundaries or class of subjects which limit and characterize the power to regulate commerce; but, in maritime matters, it extends to all matters and places to which the maritime law extends.''

Again, in the Garnett case (p. 14), the Court says:

''As the Constitution extends the judicial power of the United States to 'all cases of admiralty and maritime jurisdiction,' and as this jurisdiction is held to be exclusive, the power of legislation on the same subject must necessarily be in the National Legislature, and not in the State Legislatures.''

In Butler v. Boston & Savannah Steamship Co., 130 U. S. 527, the Court clearly stated the ground upon

which the power of Congress to amend or modify the maritime law rests. In that case the Court held that the law of limited liability of ship owners applies to cases of personal injury and death, as well as to cases of loss of, or injury to, property, and the Court, after quoting from several cases, said:

"These quotations are believed to express the general, if not unanimous, views of the members of this court for nearly twenty years past; and they leave us in no doubt that, whilst the general maritime law, with slight modifications, is accepted as law in this country, it is subject to such amendments as Congress may see fit to adopt. One of the modifications of the maritime law, as received here, was a rejection of the law of limited liability. We have rectified that. Congress has restored that article to our Maritime Code. We can not doubt its power to do this. As the Constitution extends the judicial power of the United States to 'all cases of admiralty and maritime jurisdiction,' and as this jurisdiction is held to be exclusive, the power of legislation on the same subject must necessarily be in the National Legislature, and not in the State Legislatures. It is true, we have held that the boundaries and limits of the admiralty and maritime jurisdiction are matters of judicial cognizance, and can not be affected or controlled by legislation, whether State or National."

See, also, Robertson v. Baldwin, 165 U. S. 275.

The Duty of the Courts as to Unconstitutional Acts of Congress.

We will now briefly consider what the duty of the courts is with respect to declaring unconstitutional and void Acts of Congress which find no warrant in the Constitution. As early as 1803, in Marbury v. Madison, 1 Cranch. 127, the Court declared void an Act of Congress which attempted to confer upon this Court the power to issue writs of mandamus in classes of cases of original jurisdiction. The Court held that such power was not conferred upon Congress by the Constitution; that the United States Government was one of limited powers; that the powers of the Legislature were defined and limited, and that it was in order that those limits may not be mistaken or forgotten the Constitution was written. The Court then said:

"To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a Government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it; or, that the Legislature may alter the Constitution by an ordinary act. Between those alternatives there is no middle ground. The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative

acts, and, like other acts, is alterable when the Legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written Constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable."

Acts of Congress have also been declared unconstitutional and void in the following, among other, cases:

United States v. DeWitt, 9 Wall. 41;
Ex parte Garland, 4 Wall. 333;
United States v. Harris, 106 U. S. 629;
Pollock v. Farmers Loan & Trust Co., 147 U. S. 429, 158 U. S. 601;
Hepburn v. Griswold, 8 Wall. 603;
The Civil Rights Cases, 109 U. S. 3;
United States v. Reese, 92 U. S. 214;
Trade Mark Cases, 100 U. S. 82;
Louisiana v. Allen, 103 U. S. 80.

In the Reese case, *supra,* the Court said:

"But if Congress steps outside of its constitutional limitations and attempts that which is beyond its reach, the courts are authorized to, and when called upon must, annul its encroachment upon the reserved rights of the States and the people."

In the Civil Rights cases, *supra,* this language is used:

"An inspection of the law shows that it makes no reference whatever to any supposed or apprehended violation of the Fourteenth Amendment on the part of the

States. It is not predicated on any such view. It proceeds *ex directo* to declare that certain acts committed by individuals shall be deemed offenses, and shall be prosecuted and punished by proceedings in the courts of the United States. It does not profess to be corrective of any constitutional wrong committed by the States; it does not make its operation to depend upon any such wrong committed. It applies equally to cases arising in States which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws, as to those which arise in States that may have violated the prohibition of the amendment. In other words, it steps into the domain of local jurisprudence, and lays down rules for the conduct of individuals in society towards each other, and imposes sanctions for the enforcement of those rules, without referring in any manner to any supposed action of the State or its authorities.

"If this legislation is appropriate for enforcing the prohibitions of the amendment, it is difficult to see where it is to stop. Why may not Congress with equal show of authority enact a code of laws for the enforcement and vindication of all rights of life, liberty, and property? If it is supposable that the States may deprive persons of life, liberty, and property without due process of law (and the amendment itself does suppose this),why should not Congress proceed at once to prescribe due process of law for the protection of every one of these fundamental rights, in every possible case, as well as to prescribe equal privileges in inns, public conveyances, and theatres? The truth is, that the implication of a power to legislate in this manner is based upon the assumption

that if the States are forbidden to legislate or act in a particular way on a particular subject, and power is conferred upon Congress to enforce the prohibition, this gives Congress power to legislate generally upon that subject, and not merely power to provide modes of redress against such State legislation or action. The assumption is certainly unsound. It is repugnant to the Tenth Amendment of the Constitution, which declares that powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."

In Dred Scott v. Sanford, 19 How. 293, 401, the Court, speaking through Chief Justice Taney, of the peculiar characteristics of the Government of the United States, used this language:

"For although it is sovereign and supreme in its appropriate sphere of action, yet it does not possess all the powers which usually belong to the sovereignty of a nation. Certain specified powers enumerated in the Constitution have been conferred upon it, and neither the legislative, executive, nor judicial departments of the Government can lawfully exercise any authority beyond the limits marked out by the Constitution."

And again:

"If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption. It is not only the same in words, but the same in meaning, and delegates the same powers to the Gov-

ernment, and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day."

Can there be the slightest doubt that Sec. 10 of the Act of June 1, 1898, is very much more drastic, and finds very much less support in the Constitution of the United States, than any of the other Acts of Congress which were declared to be unconstitutional in the cases last cited and quoted from? As we have said, and we wish to emphasize, all of the other sections of the Act in question except Section 10 refer to *voluntary* arbitrations between interstate carriers and their employes. Sec. 10 bears no reasonable relation to the rest of the Act; treats of an entirely different subject, and is *mandatory* in character. It is evident that after the Act was originally drafted to meet the views of the Strike Commission, and applicable only to *voluntary* arbitrations, that, at the instance of labor organizations or otherwise, Sec. 10 was interpolated, notwithstanding the opinion of the Strike Commission that Congress had no power to legislate upon the subjects embraced in said section. The rest of the Act can well be sustained, even though Sec. 10 is declared unconstitutional, as we earnestly ask the court to do.

II.

The Act under investigation is unconstitutional and void for the further reason that it is violative of the Fifth Amendment of the Constitution of the United States, which provides, among other things, that no person shall be deprived of life, liberty, or property without due process of law. The proposition is too well settled to require citation of authority to support it, that the Fifth Amendment, in fact all of the first ten amendments, to the Constitution of the United States are limitations upon the powers of the Federal Government. The Fifth Amendment has been held to be the correlative of the Fourteenth Amendment, and imposes upon Congress like restraint so far as depriving persons of life, liberty, or property is concerned, that the Fourteenth Amendment imposes upon the several States respecting similar legislation. A corporation is a person within the meaning of the Constitution, as has been repeatedly declared by this Court. Sec. 10 of the Act under investigation impairs, if it does not in fact destroy, the valuable property right of contract. Similar statutes of at least four State Legislatures have been declared unconstitutional and void by the courts of last resort in those States, upon the ground that such statutes deprived the corporation or person against whom they were directed of liberty and property without due process of law. The first of these cases, State v. Julow, 31 S. W. 781, arose in Missouri under a statute similar to the Act of Congress we are considering. The reasoning of the Supreme Court of Missouri in that case is so cogent and forceful that we quote from it at some length, as follows: (Italics ours.)

"In Section 30, *supra*, as well as in the section in the Federal Constitution just recited, it will be noted that the rights of life, liberty, and property are grouped together in the same sentence; *they constitute a trinity of rights*, and each, as opposed to unlawful deprivation thereof, is of equal constitutional importance. With each of those rights, under the operation of a familiar principle, every auxiliary right, every attribute necessary to make the principle right, effectual, and valuable in its most extensive sense, pass as incidents of the original grant. 'The rights thus guaranteed are something more than the mere privileges of locomotion; the guarantee is the negation of arbitrary power in every form which results in the deprivation of a right.' These terms, 'life,' 'liberty,' and 'property,' are representative terms, and cover every right to which a member of the body politic is entitled under the law. Within their comprehensive scope are embraced the right of self-defense, freedom of speech, religious and political freedom, exemption from arbitrary arrests, the right to buy and sell as others may—all our liberties, personal, civil, and political—in short all that makes life worth living; and of none of these liberties can any one be deprived except by due process of law. 2 Story, Const. (5th Ed.), Sec. 1950. Now, as before stated, each of the rights heretofore mentioned carries with it, as its natural and necessary coincident, all that effectuates and renders complete the full, unrestrained enjoyment of that right. Take, for instance, that of property. Necessarily blended with that right are those of acquiring property by labor, *by contract, and also of terminating that contract at pleasure*, being liable, however, civilly for any unwarranted termination. In the

case at bar, as will be remembered, the contract was not made for any definite period. *From these premises it follows that 'depriving an owner of property of one of its essential attributes is depriving him of his property within the constitutional provision.'* People v. Otis, 90 N. Y. 48. In State v. Goodwill, 33 W. Va. 179, 10 S. E. 285, relative to the subject under consideration, it is said: 'The right to use, buy, and sell property, and contract in respect thereto, including *contracts for labor, which is, as we have seen, property, is protected by the Constitution.'* In the present instance, does the act in question seek to deprive the owner or the representative of the owner *of one of the essential attributes of his property, to wit, the right to terminate any contract made by him,* and does it profess to do this by force of its own terms, and without opportunity of being heard? If it does, then it falls under the ban of the prohibitory provisions of both the State and Federal Constitutions.

"The 'law of the land' and 'due process of law,' are the legal equivalents of each other. Touching this topic, a distinguished jurist observes: 'Perhaps no definition is more often quoted than that given by Mr. Webster in the Dartmouth College Case: "By the law of the land is most clearly intended the general law, a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial." The meaning is that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land.' Cooley, Const. Lim. (6th Ed.), 431. Comstock, J., when discussing a constitutional pro-

hibition such as ours, said: 'No doubt, it seems to me, can be admitted of the meaning of these provisions. To say, as has been suggested, that "the law of the land" or "due process of law," may mean the very act of legislation which deprives the citizen of his rights, privileges, or property, leads to a simple absurdity. The Constitution would then mean that no person shall be deprived of his property or rights unless the Legislature shall pass a law to effectuate the wrong; and this would be throwing the restraint entirely away. * * * Where rights of property are admitted to exist, the Legislature can not say they shall exist no longer; nor will it make any difference although a process and a tribunal are appointed to execute sentence. If this is the "law of the land" and "due process of law" within the meaning of the Constitution, then the Legislature is omnipotent. It may, under the same interpretation, pass a law to take away liberty or life without a pre-existing cause, appointing judicial and executive agencies to execute its will. Property is placed by the Constitution in the same category with "liberty and life." ' Wynehamer v. People, 13 N. Y. 378. Here, the law under review declares that to be a crime which consists alone in the exercise of a constitutional right, to wit, that of terminating a contract—one of the essential attributes of property, indeed property itself, under preceding definitions. Brought to the bar of a court on such a charge, the accused would have been prejudged in so far as the criminality of the act charged is concerned. No question could there be made or admitted as to the quality of the act. That would have been settled by the previous legislative declaration, and it would only remain to find the fact as charged in order to de-

clare the guilt as charged. *But the fact as charged, as already seen, is not a crime, and will not be a crime so long as constitutional guarantees and constitutional prohibitions are respected and enforced.* If an owner, etc., obeys the law on which this prosecution rests, he is thereby deprived of a right and a liberty to contract or terminate a contract, as all others may; if he disobeys it, then he is punished for the performance of an act wholly innocent, unless, indeed, the doing of such act, guaranteed by the organic law—the exercise of a right of which the Legislature is forbidden to deprive him—can by that body be conclusively pronounced criminal. We deny the power of the Legislature to do this, to brand as an offense that which the Constitution designates and declares to be a right, and therefore an innocent act; and consequently we hold that the statute which professes to exert such a power is nothing more nor less than a 'legislative judgment,' and an attempt to deprive all who are included within its terms of a constitutional right without due process of law." (Citing a number of cases.)

In Gillespie v. People, 58 N. E. 1007, a statute of Illinois similar to Sec. 10 of the Act of Congress, and to the statute which was condemned in the Julow case, was held to be unconstitutional by the Supreme Court of Illinois, in an opinion which closely followed the language and reasoning of that case. In part, the court said:

"One citizen can not be compelled to give employment to another citizen, nor can any one be compelled to be employed against his will. The Act of 1893, now under consideration, deprives the employer of the right to terminate his contract with his employe. The right to ter-

minate such a contract is guaranteed by the organic law of the State. The Legislature is forbidden to deprive the employer or employe of the exercise of that right. The Legislature has no authority to pronounce the performance of an innocent act criminal, when the public health, safety, comfort, or welfare is not interfered with. The statute in question says that, if a man exercises his constitutional right to terminate a contract with his employe, he shall, without a hearing, be punished as for the commission of a crime. * * * Here the employment, as has already been stated, was by the day (*so it was as to the employe in the case at bar*); and at the end of each day there was no obligation on the part of Gillespie to furnish another day's work, and no obligation on the part of Gibbons to labor for Gillespie. At the time of the alleged offense there was in fact no contract of employment, but at that time Gillespie said, in substance, to Gibbons, 'I am not employing union men, and, if you belong to the union, you can look elsewhere for employment.' This was not a crime on the part of the plaintiff in error, Gillespie. His sole offense consisted in refusing to give employment to a man who belonged to a union labor organization. In other words, he merely exercised his constitutional right of terminating a contract, or refusing to make a contract. Liberty includes not only the right to labor, but to refuse to labor, and consequently the right to contract to labor or for labor, and to terminate such contracts, and to refuse to make such contracts. The Legislature can not prevent persons who are *sui juris* from laboring, or from making such contracts as they may see fit to make relative to their own lawful labor; nor has it any power by penal laws to prevent any

person, with or without cause, from refusing to employ another, or to terminate a contract with him, subject only to the liability to respond in a civil action for an unwarranted refusal to do that which has been agreed upon. Hence we are of the opinion that this act contravenes those provisions of the State and Federal Constitutions which guarantee that no person shall be deprived of life, liberty, or property without due process of law."

In State *ex rel.* Zillmer, Sheriff, v. Kreutzberg, 90 N. W. 1098, the Supreme Court of Wisconsin, in a very able and well reasoned opinion, in which the Julow and Gillespie cases, *supra,* were referred to approvingly, declared unconstitutional a statute of that State substantially like the others we have noticed, which provided that no person or corporation should discharge an employe because he was a member of a labor organization. Among other things the court said:

"Free will in making private contracts, and even in greater degree in refusing to make them, is one of the most important and sacred of the individual rights intended to be protected. That the present act curtails it directly, seriously, and prejudically, can not be doubted. The success in life of the employer depends on the efficiency, fidelity, and loyalty of his employes. Without enlarging upon or debating the relative advantages or disadvantages of the labor union, either to its members or to the community at large, it is axiomatic that an employer can not have undivided fidelity, loyalty, and devotion to its interests from an employe who has given to an association right to control his conduct. * * * Such considerations an employer has a right to deem valid reasons

for preferring not to jeopardize his success by employing members of organizations. A man who has by agreement or otherwise shackled any of his faculties—even his freedom of will—may well be considered less useful or less desirable by some employers than if free and untrammeled. Whether the workman can find in his membership in such organizations advantages and compensations to offset his lessened desirability in the industrial market is a question each must decide for himself. His right to freedom in so doing is of the same grade and sacredness as that of the employer to consent or refuse to employ him according to the decision he makes. We must not forget that our Government is founded on the idea of equality of all individuals before the law. Such restraints as may be placed on one may be placed on another. If the liberty of the employer to contract or refuse to contract may be denied, so may that of the employe. * * *

"Is it within the legislative power to make criminal the refusal to contract with another for his labor for any reason which the employer deems cogent? We speak of refusal to contract, for, while the act mentions only discharge, it is in no wise limited to situations where there is any contract or other right to continuance of employment, and is obviously intended by the framers to apply generally to the relation of employer and employe, where, as common knowledge assures us, there is usually no term of employment, and each day constitutes a new contract. As each morning comes, the employe is free to decide not to work, the employer to decide not to receive him, but for this statute. That the act in question invades the liberty of the employer in an extreme degree,

and in a respect entitled to be held sacred, except for the most cogent and urgent countervailing considerations, we have pointed out. Hardly any of the personal civil rights is higher than that of free will in forming and continuing the relation of master and servant. If that may be denied by law, *the result is legalized thraldom, not liberty*—certainly not to the laboring men of the country. This aspect of the subject is too clear to warrant further discussion. Is there any conceivable reason to warrant such extreme invasion of individual liberty? Can it be necessary to the reasonable liberty of others under the law? The act here charged as criminal clearly does not deprive any other person of any private or civil right. Its utmost effect is to deny privilege of contract, but *no right exists to enter into contract with another against his will.* The maxim, '*Sic utere tuo ut non alienum laedas,*' can not justify restraint of acts which do not injure others in their legal rights. * * * " (Italics ours.)

In People v. Marcus, 77 N. E. 1073, the Court of Appeals of New York declared unconstitutional a similar statute, which attempted to prohibit any person from making the employment of another conditional on the employe not joining or becoming a member of a labor organization, on the ground that the statute impaired freedom of contract.

In Wallace v. Georgia C. & N. R'y Co., 22 S. E. 579, the Supreme Court of Georgia declared unconstitutional, upon like grounds, an act of the Georgia Legislature which attempted to require certain corporations to give to their discharged employes or agents the causes of their removal or discharge, when discharged or removed.

To the same effect is New York, etc., R. Co. v. Shaffer, 62 N. E. 1036. See, also, Shaver v. Pennsylvania Co., 71 Fed. 931.

In Brewster v. Miller's Sons & Co., 101 Ky. 358, Brewster sued a number of funeral directors because of their refusal to furnish burial supplies for his wife. The organization of funeral directors had a charter and by-laws which forbade any member of it to furnish any person supplies who owed a member of the association for supplies previously furnished, and who declined to pay for them. The court denied Brewster a right to recover, and quoted approvingly from Cooley on Torts, 278, as follows:

"It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice. With his reasons neither the public nor third persons have any legal concern."

Further along the opinion quotes from the same learned author, as follows:

"The exercise by one of his legal rights can not be a legal wrong to another. * * * Whatever one has a right to do, another can have no right to complain of."

The same question was again passed upon by the Court of Appeals in Hundley v. L. & N. R. Co., 105 Ky. 162. Hundley sued the railroad company for being discharged and blacklisted. A demurrer to the petition was sustained and this was affirmed on appeal in an opinion in the course of which this language is used:

"It is the part of every man's civil rights to enter into any lawful business, and to assume business relations with any person who is capable of making a contract. It is likewise a part of such rights to refuse to enter into business relations, whether such refusal be the result of reason, or of whim, caprice, prejudice, or malice. If he is wrongfully deprived of these rights he is entitled to redress. Every person *sui juris* is entitled to pursue any lawful trade, occupation, or calling. It is part of his civil rights to do so. He is as much entitled to pursue his trade, occupation, or calling, and he is protected in it, as is the citizen in his life, liberty, and property."

And again the court, in the same opinion, says:

"A railroad company has the right to engage in its service whomsoever it pleases, and, as a part of its right to conduct its business, is the right to discharge any one from its service, unless to do so would be in violation of contractual relations with the employe."

In Allgeyer v. Louisiana, 165 U. S. 578, the Court said:

"The liberty mentioned in that [Fourteenth] Amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out

to a successful conclusion the purposes above mentioned."

In Arthur v. Oakes, 63 Fed. Rep. 310, the court, through Mr. Justice Harlan, said:

"The rule, we think, is without exception that equity will not compel the actual, affirmative performance by an employe of merely personal services, any more than it will compel an employer to retain in his personal service one who, no matter for what cause, is not acceptable to him for service of that character."

In that case, the Circuit Court, during the labor troubles of 1894, had enjoined certain employes from so quitting work as to cripple the property or prevent or hinder the operations of the railroad. The court held the order was erroneous, because it invaded the natural rights of man; the court saying it would be an invasion of one's natural liberty to compel him to work or to remain in the personal service of another.

By way of attempted answer to the Julow, Gillespie, Kreutzberg, and Marcus cases, from which we have quoted or to which we have referred, counsel for the Government cited at *nisi prius* Davis v. State, 30 Ohio Law Journal, 342, 11 Ohio Dec. Reprint, 894, decided by a court of Common Pleas of Hamilton County, Ohio. The Court will hardly feel that a decision of a *nisi prius* court is to be accepted as against the opinions of the courts of last resort of Missouri, Illinois, Wisconsin, and New York—even if another *nisi prius* court of Ohio, of equal dignity and ability to the one which decided the Davis case, had not decided the question in favor of the

position for which we are contending and against the position taken by counsel for the Government. In State v. Bateman, 7 Ohio N. P. R. 487, it was said:

"If a law is constitutional which requires an employer against his will to retain an employe in his service, then the law which requires an employe against his will to remain in the service is constitutional. * * * Once admit that the Legislature has the power to restrain the individual from conducting his business in his own way when such restraint is not required for the public welfare, then there is no limit to the restraint which can be imposed, and that, as said by one of the authorities, would be despotism pure and simple."

In the same case it was said:

"A law which prohibits an employer in contracting for labor from reserving the right to discharge his employes at pleasure, or, having reserved such right, prohibits him from enforcing it, directly infringes on his right of liberty to contract."

At any rate, the Davis case does not sustain the Government's contention. That case expressly says "I do not think this (statute) takes away from the employer the right to discharge his employe. He may discharge him for any reason, but he shall not attempt to coerce him to quit the labor organization."

This can only mean that an employer has the right to keep out of his service or remove from his service an employe who is a member of a labor union, for that reason alone. Counsel are claiming very much broader restrictions of the liberty of the employer in this respect

under the statute under consideration, and the statute, in express terms, so provides.

Judge Cochran inquired, during the oral argument before him, whether either the Julow, Gillespie, Kreutzberg, or Marcus cases involved the discharge of an employe of a railroad company because of his membership in a labor organization, etc., and counsel for the Government readily caught at the suggestion involved in the *quaere,* and attempted to argue that there was ground to uphold such legislation when applied to railroad companies and their employes, even though such legislation has been uniformly declared to be invalid as affecting the relations between master and servant in other pursuits. We think Arthur v. Oakes, 63 Fed. 310, 318, answers Judge Cochran's inquiry. The court, speaking by Mr. Justice Harlan, said:

"The rule, we think, is without exception that equity will not compel the actual, affirmative performance by an employe of merely personal services, any more than it will compel an employer to retain in his personal service one who, no matter for what cause, is not acceptable to him for service of that character. The right of an employe engaged to perform personal service to quit that service rests upon the same basis as the right of his employer to discharge him from further personal service. If the quitting in the one case, or the discharging in the other, is in violation of the contract between the parties, the one injured by the breach has his action for damages; and a court of equity will not, indirectly or negatively, by means of an injunction restraining the violation of the contract, compel the affirmative performance from day to day or the affirmative acceptance of merely per-

sonal services. Relief of that character has always been regarded as impracticable. Toledo A. A. & N. M. R'y Co. v. Pennsylvania Co., 54 Fed. 730, 740. Taft, J., and authorities cited; Frey Spec. Perf. (3d Am. Ed.), Secs. 87-91, and authorities cited.

"It is supposed that these principles are inapplicable or should not be applied in the case of employes of a railroad company, which, under legislative sanction, constructs and maintains a public highway primarily for the convenience of the people, and in the regular operation of which the people are vitally interested. Undoubtedly the simultaneous cessation of work by any considerable number of the employes of a railroad corporation, without previous notice, will have an injurious effect, and for a time inconvenience the public. But these evils, great as they are, and although arising in many cases from the inconsiderate conduct of employes and employers, both equally indifferent to the general welfare, are to be met and remedied by legislation *restraining alike employes and employers,* so far as necessary adequately to guard the rights of the public as involved in the existence, maintenance, and safe management of public highways. In the absence of legislation to the contrary, the right of one in the service of a *quasi* public corporation to withdraw therefrom at such time as he sees fit, and the right of the managers of such a corporation to discharge an employe from service whenever they see fit, must be deemed so far absolute that no court of equity will compel him, against his will, to remain in such service or actually to perform the personal acts required in such employments, or compel such managers, against their will, to keep a particular employe in their service."

In fact, subsection 1, section 3, of the Act expressly declares "That no employe shall be compelled to render personal service without his consent." The same declaration is repeated in subsection 3. The statute is wholly lacking in mutuality.

Assuming, for the sake of argument, the power of Congress to enact legislation "restraining alike employes and employers," the act in question is clearly open to the objection that while it attempts to restrain the employer from dispensing with the services of union laborers, it in no wise restrains, or attempts to do so, such employes from leaving the master's service whenever they see fit to do so, and however much such quitting the service may inconvenience the master or cripple his business. "It is a poor rule that won't work both ways."

The authorities from which we have quoted and which we have cited, are so strong, well-reasoned and unanswerable that we feel there is no comment we can make upon them which will add anything of value to what they have said as applicable to the second ground upon which we ask this court to hold that Sec. 10 of the act of June 1, 1898, is unconstitutional. If the Fifth Amendment to the Constitution is to have any force or vitality when it declares that no person is to be deprived of life, liberty or property without due process of law, then it certainly prohibits the section of which we are complaining, which attempts to deprive interstate carriers of the extremely valuable and indispensable property right of freedom of contracting with such employes as the carriers feel will best promote and protect the interests of the public and of the carriers, and of refusing to contract for labor with other employes who will not, in the carrier's judgment, equally promote and protect those interests.

III.

Sec. 10 of the Act of June 1, 1898, is unconstitutional for the still further reason that it is class legislation, and the classification is unreasonable. The statute attempts to confer privileges upon union labor that are not conferred upon non-union labor. No restraint whatever is imposed upon carriers with respect to refusing to employ, discharging or discriminating against non-union laborers. However lawful it may be for employes to organize and become members of labor unions or associations, it is too clear for argument that under our form of government, which guarantees equal privileges to all before the law, that it is not competent for Congress, or State legislatures, to make such an unreasonable classification as has been attempted in the statute before us, whereby union labor is preferred as against non-union labor.

On this point the Supreme Court of Mississippi, in the Ballard case, *supra*, said:

"Our conclusion, after the most careful and protracted consideration, is that Section 1 of the Act of 1898 (Acts 1898 p. 85 ch. 66) violates the fourteenth amendment of the Constitution of the United States, in that it imposes restrictions upon all corporations, without reference to any difference arising out of the natures of their businesses, which are not imposed upon natural persons, and thus denies to corporations the equal protection of the law. We are, therefore, constrained to declare the said act unconstitutional."

See also Johnson v. R'y Co., 43 Minn. 223, 8 L. R. A. 419.

In Gulf, Colorado & Santa Fe R'y Co. v. Ellis, 165 U. S. 150, a statute of Texas which attempted to allow persons having *bona fide* claims of designated character against railroad companies to recover attorney's fees where such claims were sued on, if not paid thirty days after presentation, was held invalid because obnoxious to the Fourteenth Amendment to the Federal Constitution, in that the statute operated to deprive railroad companies of their property without due process of law, and denied to them the equal protection of the law in that it singled them out of all citizens and corporations, and required them to pay, while it gave such corporation no like or corresponding benefit. The court also held that the mere fact of classification was not sufficient to relieve the statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not merely that a classification has been made, but that it is based upon some reasonable ground—something which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection.

In Robertson v. Baldwin, 165 U. S. 275, this Court had under consideration the Act of Congress allowing the arrest by magistrates of deserters from ships, and the return of such deserters to the vessels upon which they had shipped. It was contended that this was in violation of the Thirteenth Amendment. The Court rejected the contention, but in doing so held that the contract of a sailor has always been treated as an exception

al one. In the dissenting opinion in that case by Mr. Justice Harlan (on page 299) it is said:

"The Constitution furnishes no authority for any such distinction between classes of persons in this country. * * * To give any other construction to the Constitution is to say that it is not made for all, and that all men in this land are not free and equal before the law."

This seems to recognize the principle for which we contend, and the opinion of the Court seems not to be opposed to it.

Sec. 10 is exclusively in favor of employes who are members of labor organizations, and therefore discriminates against non-union labor. Before the statute was enacted, the law unquestionably was that any employer of labor could discharge, or refuse to employ, any person, whether union or non-union, with or without cause, or from mere whim, caprice or malice. Such is still the law, even if the statute is valid, as to every employer of labor except "carriers engaged in interstate commerce," and, even then, except as to union labor. The statute makes no attempt to protect any class of workingmen except members of labor organizations who work "in train operation or train service." Therefore, it not only discriminates unjustly in favor of union labor as against non-union labor, but also discriminates in favor of union labor "in train operation or train service" as against union labor engaged in any other pursuits. Is this that "equality before the law" which is our boasted heritage? Certainly, the spirit of our institutions condemns legislation in behalf of one class of persons at the expense of another class of persons, and particularly is this true where the one class is favored merely because they have

banded themselves together in a labor union, whereas the other class has chosen to remain independent, and free from the obligations and dictation of labor unionship. It would, indeed, be remarkable if Congress, or any other legislative body in a country governed by constitutional law, would have the right, for political or other reasons, to show such preference for organized labor, and to impose upon the employer a greater obligation with respect to the employment and retention of members of labor unions, than with respect to employes who are not so affiliated; and thereby, in effect, compel the employer to give preference to those who have taken oaths and obligations requiring their first allegiance to be given to their organizations and not to their employer, as against another large class of employes, equally efficient, who are not members of labor organizations, and who are, therefore, left free to give their first and best allegiance and service to the welfare of their employer's interests. No legislation, either by Congress or by State Legislatures, can thus assail, successfully, the inalienable right of freedom to make or refuse to make contracts, or can declare that to be criminal which is not, and will not be, "a crime so long as constitutional guarantees and constitutional prohibitions are respected and enforced."

IV.

In Gibbons v. Ogden, 9 Wheaton 1, at page 94, the Court said:

"Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. * * * The completely internal com-

merce of a State, then, may be considered as reserved for the State itself."

Similar language is used in the Trade Mark Cases, 100 U. S. 96, and in Wabash R'y v. Illinois, 118 U. S. 557, 565.

These cases clearly recognized and enforced the duality of control over commerce as between the States and the Federal Government. If a carrier generally engaged in interstate commerce elects also to engage in intrastate commerce it thereby renders itself amenable to State regulation as to such intrastate commerce. Osborne v. Florida, 164 U. S. 650. Pullman Co. v. Adams, 189 U. S. 420; Pennsylvania Railroad Co. v. Knight, 192 U. S. 21. These cases especially illustrate the taxing powers of the States as to interstate carriers upon their intrastate business. Another line of cases illustrative of this doctrine concerns the right of the States to pass separate coach laws. These cases commenced with Hall v. DeCuir, 95 U. S. 485, and included C. & O. R'y Co. v. Kentucky, 179 U. S. 388, and held that it was competent by State legislation to separate the races into separate compartments or cars, so long as such regulations were confined to carriage between points in the same State. The principle is further illustrated in the cases in regard to State laws which require railroad trains to stop at certain stations, and which laws were held by this Court to be valid or invalid depending upon whether their effect was to regulate strictly intrastate commerce, or positively, immediately and directly to affect interstate commerce.

As to the power of a State legislature over rates see L. & N. R. Co. v. Kentucky, 183 U. S. 503; Ib. v.

Eubank, 184 U. S. 27. In one of these cases it was held that it was competent for the Court of Appeals of Kentucky to enforce the constitutional provision that the charge for a short haul should not be greater than the charge for a long haul, so far as carriage from one point in the State to another point in the State was concerned, and that it was not competent to enforce it so far as carriage from a point out of the State to a point in the State was concerned. Exactly the same result has followed from an examination by this Court of the Sherman Anti-Trust Law. United States v. E. C. Knight Co., 156 U. S. 1; Hopkins v. U. S., 171 U. S. 578; and Addyston Pipe & Steel Company v. United States, 175 U. S. 211, were determined by an ascertainment of whether the particular contract was a combination in restraint of interstate traffic or simply in restraint of intrastate traffic.

Therefore, if legislation such as is embraced in Section 10 is a regulation of commerce at all, it can only apply to interstate employes of interstate carriers.

The first section of the Act of June 1, 1898, does not restrict the application of the act to those employes of interstate carriers who are engaged in the transportation of passengers and property between the several States. The act applies to *interstate carriers*, not to *interstate employes*. While practically all railroad carriers own and operate railroads lying in more than one State, and are therefore interstate carriers, still many of the trains of such carriers and the employes thereon are engaged exclusively in intrastate transportation, as to which, it must be conceded, Congress has no authority whatsoever. Inasmuch as the Act, by its terms, applies to all

employes in the train service whether moving interstate trains or intrastate trains, and as Congress has no jurisdiction over employes or commerce upon intrastate trains, we contend that the entire Act is void, it being impossible, as held in U. S. v. Steffens (the Trade Mark Cases), 100 U. S. 82, to separate the valid part of the statute from the void part, or to know just what restrictive words Congress would have used if it had attempted to restrict the application of the Act to employes on interstate trains or engaged in the movement of interstate commerce.

In the Steffens case the Court used this language:

"If we should, in the case before us, undertake to make by judicial construction a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do, namely: Make a trade mark law which is only partial in its operation, and which would complicate the rights which parties would hold, in some instances under the Act of Congress, and in others under State law. Cooley's Const. Lim. 178, 179; Com. v. Hitchins, 5 Gray, 482."

In U. S. v. Harris, 106 U. S. 629, Sec. 5519 Revised Stat. U. S. was declared unconstitutional. The statute follows:

"If two or more persons in any State or Territory conspire or go in disguise upon the highway or on the premises of another for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws or of equal privileges or immunities under the laws, or for the purpose of

preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws, each of said persons shall be punished by a fine of not less than $500, nor more than $5000, or by imprisonment, with or without hard labor, not less than six months nor more than six years, or by both such fine and imprisonment."

In the course of its opinion the Court used this language:

"Proper respect for a co-ordinate branch of the Government requires the courts of the United States to give effect to the presumption that Congress will pass no act not within its constitutional power. This presumption should prevail unless the lack of constitutional authority to pass an act in question is clearly demonstrated. While conceding this, it must, nevertheless, be stated that the Government of the United States is one of delegated, limited, and enumerated powers. Martin v. Hunter's Lessee, 1 Wheat. 304; McCullough v. State of Maryland, 4 Id. 316; Gibbons v. Ogden, 9 Id. 1. Therefore every valid act of Congress must find in the Constitution some warrant for its passage. This is apparent by reference to the following provisions of the Constitution: Section 1 of the first article declares that all legislative powers granted by the Constitution shall be vested in the Congress of the United States. Section 8 of the same article enumerates the powers granted to the Congress, and concludes the enumeration with a grant of power to make all laws which shall be necessary and proper to carry into execution the foregoing powers, and

all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof. Article 10 of the amendments to the Constitution declares that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."

The Court then quoted from Story's Commentaries on the Constitution and referred to other authorities, and said:

"The demurrer filed to the indictment in this case questions the power of Congress to pass the law under which the indictment was found. It is, therefore, necessary to search the Constitution to ascertain whether or not the power is conferred."

The same statute was again before the court in Baldwin v. Franks, 120 U. S. 678, and it was there held to be unconstitutional, as a provision for the punishment of a conspiracy, within a State, to deprive an alien of rights guaranteed to him therein by a treaty of the United States. The court used this language:

"It is now said, however, that in that case the conspiracy charged was by persons in a State against a citizen of the United States and of the State, to deprive him of the protection he was entitled to under the laws of that State, no special rights or privileges arising under the Constitution, laws, or treaties of the United States being involved; and it is argued that, although the section be invalid, so far as such an offense is concerned, it is good for the punishment of those who conspire to deprive

aliens of the rights guaranteed to them in a State, by the treaties of the United States. In support of this argument reliance is had on the well-settled rule that a statute may be in part constitutional, and in part unconstitutional, and that under some circumstances the part which is constitutional will be enforced, and only that which is unconstitutional rejected. To give effect to this rule, however, the parts—that which is constitutional and that which is unconstitutional—must be capable of separation, so that each may be read by itself. This statute, considered as a statute punishing conspiracies in a State, is not of that character, for in that connection it has no parts within the meaning of the rule. Whether it is separable so that it can be enforced in a Territory, though not in a State, is quite another question, and one we are not now called on to decide. It provides in general terms for the punishment of all who conspire for the purpose of depriving any person, or any class of persons, of the equal protection of the laws, or of equal privileges or immunities under the laws. A single provision which makes up the whole section, embraces those who conspire against citizens as well as those who conspire against aliens—those who conspire to deprive one of his rights under the laws of a State, and those who conspire to deprive him of his rights under the Constitution, laws, or treaties of the United States. The limitation which is sought must be made, if at all, by construction, not by separation. This, it has often been decided, is not enough."

The Court then cites and quotes from United States v. Reese, 92 U. S. 214, the Trade Mark Cases, 100 U. S.

82; United States v. Harris, 106 U. S. 629; Louisiana v. Allen, 103 U. S. 80, in which latter case the Court said:

"The point to be determined in all such cases is whether the unconstitutional provisions are so connected with the general scope of the law as to make it impossible, if they are stricken out, to give effect to what appears to have been the intent of the legislature."

The Court then said that applying this rule to the case at bar it was clear that Section 5519 Revised Statutes could not be sustained in whole or in part.

In United States v. Reese, the defendant, an inspector of a municipal election in the State of Kentucky, was indicted under Sections 3 and 4, 16 Stat. 140, for refusing to receive and count at such election the vote of William Garner, a citizen of the United States, of African descent. The Court declared that said sections of the act, not being confined in their operation to unlawful discrimination on account of race, color or previous condition of servitude, were beyond the limit of the Fifteenth Amendment to the Constitution, and not authorized.

The Court used this language:

"Penal statutes ought not to be expressed in language so uncertain. If the legislature undertakes to define by statute a new offense, and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime."

And again the Court used this language:

"It remains now to consider whether a statute, so general as this in its provisions, can be made available

for the punishment of those who may be guilty of unlawful discrimination against citizens of the United States, while exercising the elective franchise, on account of their race, etc.

"There is no attempt in the sections now under consideration to provide specifically for such an offense. If the case is provided for at all, it is because it comes under the general prohibition against any wrongful act or unlawful obstruction in this particular. We are, therefore, directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined, is whether we can introduce words of limitation into a penal statute, so as to make it specific, when, as expressed, it is general only.

"It would certainly be dangerous if the legislature could set a net large enough to catch all possible

offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the Government. The courts enforce the legislative will when ascertained, if within the constitutional grant of power. Within its legitimate sphere, Congress is supreme, and beyond the control of the courts; but if it steps outside of its constitutional limitations, and attempts that which is beyond its reach, the courts are authorized to, and when called upon in due course of legal proceedings must, annul its encroachments upon the reserved power of the States and the people.

"To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty.

"We must, therefore, decide that Congress has not as yet provided by appropriate legislation for the punishment of the offense charged in the indictment; and that the Circuit Court properly sustained the demurrers, and gave judgment for the defendants."

In Connolly v. Union Sewer Pipe Co., 184 U. S. 540, this Court had under review the Trust Statute of Illinois, 1893, which contained a section declaring that the Act should not apply to agricultural products or live stock while in the hands of the producer or raiser. The Court used this language:

"We therefore hold that the Act of 1893 is repugnant to the Constitution of the United States, unless its ninth section can be eliminated, leaving the rest of the act in operation.

"The principles applicable to such a question are well settled by the adjudications of this court. If different sections of a statute are independent of each other, that which is unconstitutional may be disregarded, and valid sections may stand and be enforced. But if an obnoxious section is of such import that the other sections without it would cause results not contemplated or desired by the legislature, then the entire statute must be held inoperative. The first section of the act here in question embraces by its terms all persons, firms, corporations or associations of persons who combine their capital, skill or acts for any of the purposes specified, while the ninth section declares that the statute shall not apply to agriculturists or live stock dealers in respect of their products or stock in hand. If the latter section be eliminated as unconstitutional, then the act, if it stands, will apply to agriculturists and live stock dealers. Those classes would in that way be reached and fined, when, evidently, the legislature intended that they should not be regarded as offending against the law even if they did combine their capital, skill or acts in respect of their products or stock in hand. Looking then at all the sections together, we must hold that the legislature would not have entered upon or continued the policy indicated by the statute unless agriculturists and live stock dealers were excluded from its operation and thereby protected from prosecution. The result is that the statute must be regarded as an entirety, and in that view it must be adjudged to be unconstitutional as denying the equal protection of the laws to those within its jurisdiction who are not embraced by the ninth section."

In Ballard et al. v. Mississippi Cotton Oil Co., 34 Southern 533, 81 Miss. 507, the Supreme Court of Mississippi, in an exhaustive and very able opinion by Whitfield, C. J., declared unconstitutional an act of the legislature of that State which provided that:

"Every employe of any corporation shall have the same rights and remedies for an injury suffered by him from an act or omission of the corporation or its employes as are allowed by law to other persons not employes, where the injury results from the negligence of a superior agent or officer; or of a person having a right to control or direct the services of the party injured; and also when the injury results from the negligence of a fellow servant, etc.," and that knowledge of defective appliance, etc., shall constitute no defense.

The court held that inasmuch as the act imposed restrictions on all corporations, without reference to any differences arising out of the nature of their business, not imposed on natural persons, that, therefore, the act denied to corporations the equal protection of the law.

The court further held that such act could not be held constitutional by construing it to apply only to corporations engaged in hazardous business, and by permitting the court in such case to determine from the proof whether the particular business engaged in was hazardous. The court declared the true test upon this question to be found in U. S. v. Reese, 92 U. S. 220; U. S. v. Harris, 106 U. S. 629; Baldwin v. Franks, 120 U. S. 685, 690.

Summing up, the Mississippi court said:

"There never can be any room for the application of the doctrine as to severing a statute, except in those cases where the constitutional provisions, as well as the unconstitutional provisions, both appear on the *face of the statute,* and that, wherever a court has to *insert* in a statute words or provisions *not put* there by the *legislature* it is guilty simply of judicial legislation."

See, also, Allen v. Pullman Company, 191 U. S. 171; I. C. R. Co. v. McKendree, 203 U. S. 514.

Therefore, we ask the Court to hold the act void, because interstate and intrastate employes are so commingled by the act as that it is not possible to make it apply only to interstate employes, unless the Court reads into the act something which Congress has not put there, and this the Court will not do.

V.

Judge Evans' Opinion.

We will now briefly notice the opinion of Judge Evans, in which Sections 1 and 10 were declared to be unconstitutional. Judge Evans pointed out that there were no clauses of the Federal Constitution which could support Section 10, unless it be those found in Article 1, Section 8, of that instrument. He quoted the definition of Commerce given by this Court in Gibbons v. Ogden, 9 Wheaton 89, and then said:

"The power conferred upon Congress is to regulate this commercial intercourse and the carrying on thereof among States, and unquestionably it may devise any

proper and necessary means for doing that particular thing. Does the legislation now in question, in any fair sense, regulate commercial intercourse among the States, or does it only regulate certain phases of the intercourse between employer and employe? If the latter is all, even though this legislation is associated in the same act with other provisions which do regulate commercial intercourse among the States, can it be maintained as constitutional? It is elementary that one provision in an act may be constitutional and another unconstitutional. One may stand and the other fall if they may be separated, as here they easily can be, as between Sec. 10 and the other clauses of the Act. So that Sec. 10 might fall and the remaining portions of the Act of June 1, 1898, be constitutional. It is true it has been judicially determined that Congress has the power in regulating interstate commerce to impose duties upon carriers which have reference to the safety of employes while actually discharging duties pertaining to interstate commerce, as well as to that of passengers and property, but it can hardly be fairly contended that the provisions of Sec. 10 have any such purpose in view. Those provisions relate, not to the safety of the employes while actually discharging duties pertaining to interstate commerce, but to their being members of labor unions, and, in the matter of making and enforcing contracts for hiring them, forbids discriminations against them on that ground. Indeed, we can not, and we certainly should not shut our eyes to the fact (which is clear enough upon the face of the section as well as otherwise) that the essential purpose of the enactment was not to 'regulate commercial intercourse among the States,' but was to prevent,

generally, discriminations against what is called union labor in one State alone as well as in more than one. We can not too strongly emphasize this obvious fact. If this proposition be true (and it seems to us that no one can fairly doubt it), then the question is settled, for whatever the States might do in such matters through their own Legislatures, the Constitution of the United States does not confer upon Congress by any express language nor by any fair implication from any language used, the power, when servants are employed, to prevent discriminations against union labor, either in Kentucky alone or in several States, even if the hirer at the time does happen to be engaged in interstate traffic. Such legislation for such a purpose can not be supposed to have been in the contemplation of the framers of the Constitution. The legislation to prevent discrimination against union labor in respect to employing or retaining servants, therefore, is not, in the opinion of the court, a regulation of commerce, and certainly it is not a 'regulation of commercial intercourse among the States' within the meaning of the Constitution, and yet the regulation of that one thing, namely, the matter of discrimination against members of labor unions in respect to the employment and retention of servants, is the clear and only purpose of Sec. 10. Looking squarely at the language of the section, this would seem to be the only conclusion that is possible."

In summarizing his conclusions Judge Evans used this language:

"First, that Sec. 10 of the Act of June 1, 1898, is not, in the constitutional sense, a regulation of commerce or

of commercial intercourse among the States, and can not justly nor fairly be so construed or treated, inasmuch as its essential object manifestly is only to regulate certain phases of the right of an employer to choose his own servants, whether the duties of these servants, when employed, shall relate to interstate commerce or not; and, second, upon the ground that Sec. 10 is so broad as to be condemned by the rule laid down in the Trade-mark cases."

It will therefore be seen that Judge Evans held Sec. 10 unconstitutional upon two grounds:

(1) That the attempted regulation of the relation between employer and employe by Sec. 10 was not a regulation of commerce within the commerce clause of the Constitution.

(2) That intrastate and interstate employes are so commingled by the Act as that the Act can not be applied only to interstate employes, without the court reading into the act something which Congress did not put there.

It seems to us that the conclusions reached by Judge Evans on both of these propositions are eminently sound and correct, and that they should prevail with this Court.

VI.

Judge Cochran's Opinion.

We come now to Judge Cochran's opinion, *supra*, and inasmuch as he takes issue with our position in material respects, it will be necessary, and we shall endeavor, to point out wherein, in our judgment, his con-

clusions are erroneous. The Court will observe that his opinion indicates that he was uncertain of his ground, and that he was not satisfied that his reasoning and conclusions were not as a house builded upon the sands, instead of on a rock.

(a) While it may be true, as stated in the opinion, that the Erdman Act was the outcome of the Chicago strike, it is certainly true, as we have hereinbefore seen, that the Chicago Strike Commission did not recommend the enactment of Congressional legislation of the character embraced in Sec. 10, but seemed, from its report, to realize that such legislation, if enacted at all, must be enacted by State legislatures and not by Congress. Judge Cochran says that the Act is something more than a mere voluntary arbitration measure, although that is its principal effect. By Section 2 it is provided that *upon request of either party* to the controversy the chairman of the Interstate Commerce Commission and the Commissioner of Labor shall put themselves in communication with the parties to such controversy. Section 3 provides in substance that where the controversy between the carrier and its employes can not be settled by mediation as provided in Section 2 that the controversy *may be* submitted to arbitration in the manner pointed out by said section. If the parties to the controversy invoke the mediation of the chairman of the Interstate Commerce Commission and the Commissioner of Labor, or if they do agree to submit the matter in controversy to arbitration, then sections 4, 5, 6, 7, 9, and 11 provide how arbitrations shall be conducted, and what the status of the parties shall be pending such arbitration. Section 8 relates to Trade Unions, and provides

for a cessation of membership in said unions by members thereof guilty of the acts of violence mentioned in the section. Obviously, however, Section 8 has no application to any member of a labor organization other than one organized under Chapter 567, U. S. Statutes. We can find nothing in the Act which makes application to the chairman of the Interstate Commerce Commission and the Commissioner of Labor, or which makes arbitration between the parties, obligatory. Primarily, the only mandatory features of the statute are to be found in Section 10, under which the plaintiff in error was indicted. It will be observed that that section makes it a criminal offense, punishable by fine, for any employing carrier, subject to the provisions of the Act, and any officer, agent, or receiver thereof to do any one of four things, to wit:

(1) Require any employe or any person seeking employment, as a condition of employment, to enter into an agreement not to become or remain a member of any labor corporation, association, or organization; (2) threaten any employe with loss of employment or unjustly discriminate against any employe because of his membership in such a labor corporation, association, or organization; (3) require any employe or person seeking employment, as a condition of employment, to enter into a contract whereby he shall agree to contribute to any fund for charitable, social, or beneficial purposes, and to release such employer from legal liability for any personal injury by reason of any benefit received from such fund beyond the proportion of the benefit arising from the employe's contribution to such fund; (4) attempt or conspire, after having discharged an

employe, or after his quitting, to prevent him from obtaining employment.

Judge Cochran reached the conclusion that the several sections of the statute had more than a mere formal unity; that there was a unifying thread, an organizing idea that makes them parts of a real whole. He says that idea was to avoid the interruption of interstate commerce arising out of a resort by employes to strikes, lockouts, or boycots to redress their real or fancied wrongs. It seems to us that even if the learned judge is right in this view as to what the purpose of the statute was, that this does not in the least answer the proposition that the other features of the Act are primarily voluntary only, whereas Section 10 is mandatory, nor does it answer the reasoning of the Supreme Court of Wisconsin in the Kreutzberg case, *supra,* nor of this court in the Debs case, *supra.* Again, as we have already argued, even if the legislation might or would have the effect suggested by counsel for the government, and referred to in Judge Cochran's opinion, still the legislation is not a regulation of commerce within the commerce clause of the Constitution, because the effect upon commerce would not be direct and immediate, and would be, at most, only incidental, secondary, and remote.

The opinion seems to leave out of view altogether the effect upon the prudent and careful operation of railroads of legislation of the character of Section 10. It is obviously desirable that railroads shall be so operated as to minimize, as far as possible, injuring and killing passengers, employes, and others. Such is the constant aim of railroad managements. Instructions are promulgated seeking to accomplish such results. Rail-

road employes are disciplined with that end in view. Where the employe owes his first allegiance to the railroad company, and is not hampered by oaths and obligations to a labor union, obedience to rules, and the effect of such discipline, will be more probably obtained than if such employes owed their first allegiance to labor organizations. Any legislation, or judicial decision, therefore, having a tendency to break down or relax the discipline now exercised by railroad companies over their employes will almost inevitably tend to demoralization, will encourage, rather than restrain, acts of carelessness upon the part of employes resulting in killing and injuring people, and will thereby be harmful instead of beneficial to the best interests of the States and of the nation. Is it not a reflection upon the courts that it should be deemed necessary or expedient that legislation of this character should be enacted in order to prevent railroad employes who happen to be members of labor organizations from doing acts of violence, or otherwise so demeaning themselves as to interrupt interstate commerce? The Debs case seems to answer this argument, when it says, "If a State, with its recognized powers of sovereignty, is impotent to obstruct interstate commerce, can it be that any mere voluntary association of individuals within the limits of that State has the power which the State itself does not possess?"

(b) Judge Cochran notices some of the cases cited in the brief for plaintiff in error in the District Court, and some other cases not cited in said brief, in which this Court has held that certain State legislation was not an infraction of the commerce clause of the Constitution. The learned District Judge argues that those cases, in

effect, hold that it was competent for the States to legislate on those subjects in the absence of Congressional legislation, and he argues from this that the Court meant to declare that if Congress chose to act upon those subjects that it had the right to do so, and that such action would supersede the State legislation upon the same subject. We submit that the opinions which the court cites and quotes from in support of this proposition do not sustain the conclusion reached. Even if the language quoted was susceptible of the construction that the opinion puts upon it, still obviously it was merely dictum, so far as it is a recognition or declaration that there is any authority in Congress to enact such legislation. But the opinions of this Court which are referred to have a deeper signification, it seems to us, than that which Judge Cochran attributes to them. We refer particularly to the language quoted by him from the opinions of this Court in C. M. & St. P. R'y Co. v. Solon, 169 U. S. 133, in N. Y. N. H. & Hartford R'y Co. v. N. Y., 165 U. S. 626, in Smith v. Alabama, 124 U. S. 465, and Hennington v. Georgia, 163 U. S. 299. We respectfully submit that the Court could scarcely have employed language more emphatically declaring that the State legislation under review in those cases, even to the extent that it affected interstate commerce, was not a *regulation* of such commerce. If not, confessedly Congress would have no power to enact it even as to interstate commerce.

The opinion concedes, substantially, that Section 10 does not measure up to the definition given by Chief Justice Marshall in Gibbons v. Ogden, of the power to regulate commerce, and quotes Champion v. Ames, 188 U. S. 321, as characterizing that definition as a "general

observation." But the learned judge concedes that he is not satisfied with his opinion in this respect, and it seems to us, with all due respect, that his conclusions are unsound. Congress has not attempted, in enacting Section 10, to provide a *rule* by which commerce is to be governed. On the contrary, it has simply attempted to establish a rule applicable to the relation of master and servant. It is immaterial, so far as interstate commerce is concerned, whether the employes of carriers engaged in its transportation are or are not members of trade unions. If there were any possible ground upon which to justify such legislation it would be upon the ground, heretofore referred to, that the enforcement of Section 10 would probably have the effect of preventing strikes and the interruption of interstate transportation that might be incident to such strikes. But, as already stated, that which the statute aims to prevent would not be direct or certain, but would only affect commerce, if at all, obliquely, remotely, indirectly, and collaterally. Tested by the decisions of this Court which we have referred to, this is not sufficient to justify the legislation under the commerce clause of the Constitution, and we think the learned trial court was in error in holding otherwise.

(c) Touching our argument that Section 10 contravenes the Fifth Amendment of the Constitution, the learned trial judge concedes that the Julow, Gillespie, Kreutzberg, and Marcus cases, hereinbefore referred to, were correctly decided, and says that "it seems quite plausible that if State legislation of this character is unconstitutional as being in violation of the Fourteenth Amendment, prohibiting State action depriving any per-

son of life, liberty, or property without due process of law, said Section 10 is unconstitutional also as being in violation of the Fifth Amendment, prohibiting Federal action depriving a person of life, liberty, or property without due process of law." The court then goes on to hold that the Fifth Amendment is a limitation upon the commercial power of Congress conferred by the commerce clause, but says that the liberty referred to in the Fifth Amendment is only "a liberty that is reasonable and proper." The opinion then proceeds to inquire whether "the liberty of a common carrier engaged in interstate commerce to discharge an employe, or to refuse to employ him, because of his membership in a labor organization, (is) such a liberty as that it is reasonable and proper that it should not be interfered with by Congress under its commercial power?" The court concludes, erroneously, as we think, that in this respect, "a person engaged in a lawful private business, and a common carrier engaged in interstate commerce, occupy entirely different positions," because the carrier exercises a public function, which it has no right to exercise except by consent of the National Government, express or implied.

While we recognize that the doctrine last stated has been often contended for, and sometimes allowed, as a reason for enacting and enforcing discriminatory laws against public service corporations, it seems to us that this declaration by the learned district judge is not consistent with his previous declaration that the Julow, Gillespie, Kreutzberg, and Marcus cases were correctly decided. It will not be questioned, we take it, that even if Congress were not restricted, by the Commerce Clause of the Constitution, to *regulating* commerce, that its

power would be no more complete as to interstate commerce than the power of States would be to enact similar legislation as to intrastate commerce. Yet, in view of the reasoning of the courts of last resort in Missouri, Illinios, Wisconsin, and New York, above referred to, we think it can not be doubted that if the State legislatures of those States were to attempt to enact, as to intrastate employes exclusively, statutes similar to Section 10, that the courts of last resort of those States would not hesitate to declare such legislation unconstitutional, as depriving the carrier of the liberty guaranteed to him by the 14th Amendment to the Constitution of the United States, and by the "life, liberty, and property" clause of the State constitutions. L. S. & M. S. R. Co. v. Smith, *supra;* In re Greene, 52 Fed. 104, *supra.*

If Congress can decide, for an interstate carrier, as to whom it shall not refuse to employ, and whom it shall not discharge from its service—and such is the effect of Section 10—then where is the so-called "regulation" of the carrier to stop? It may be conceived that an interstate railroad might be owned by an individual or individuals not incorporated. If Section 10 would not be a constitutional exercise of Congressional power as to such individuals owning such railroad, is there any valid reason why such power can be constitutionally exercised against the owners of a railroad who are incorporated? It is true, of course, that private citizens, if they were to build a railroad, would not have the power of eminent domain. But is the mere fact that a railroad common carrier is incorporated and invested with the power of eminent domain a sufficient reason for justify-

ing, as to such corporation, legislation which would not be tolerated if enacted against an individual or a number of individuals, not incorporated, engaged in the same business? It seems to us to state this proposition is to answer it.

It will be observed that Judge Cochran does not commit himself to the conclusion his reasoning may be thought to favor. A more serious difficulty, it seems to us, with the conclusion reached by the trial court on this branch of the case, is the assumption that Section 10 is calculated to prevent an interruption of the carrier's transportation of interstate commerce, and that the controlling of the carrier in this respect is for the common good. We think the premise is false, and the conclusion drawn therefrom equally so.

(d) We think it is sufficient to say, respecting the answer made by the trial court to our third ground of objection to the constitutionality of Section 10, to wit, that interstate and intrastate employes are so commingled by the Act as that it is not possible to make it apply only to interstate employes, unless the court reads into the Act something which Congress has not put there —that if the court's reasoning on this branch of the case is sound, that there is no such thing as intrastate commerce, so far as a train or its employes are concerned. This is directly in conflict with repeated declarations of this court, which recognize that there is just as clearly intrastate commerce which the States alone can regulate, as there is interstate commerce which Congress can regulate. It seems to us the position of the trial court in this respect is obviously unsound.

(e) Judge Cochran declined to dispose of the question as to whether or not Congress can deny one the equal protection of the laws. He contented himself with declaring that Section 10 does not come within such prohibition, even if there is such a prohibition affecting Congressional action. The court concluded that, conceding the act was discriminatory in favor of employes of labor unions as against employes not members of such organizations, that the discrimination was not arbitrary and unreasonable, but was justified by public policy. The court attempts to support this view by reiterating that the purpose of the legislature was to prevent an interruption of interstate commerce, and that discriminating action on the part of a common carrier engaged in such commerce toward an employe embraced in the section is liable to bring about such an interruption. As we have already iterated and reiterated, and as we believe the reason of the thing to be, there is no foundation in fact for this assumption. If the reasoning of the court on this point is sound, and Section 10 should be upheld, the effect would be to drive all the employes of carriers embraced by the statute into the ranks of labor unions, or out of the service of carriers—a condition so manifestly unjust as to be intolerable.

VII.

For the reasons we have argued, we think it clear that the Act is unconstitutional and void: (1) because it is not a regulation of commerce, and hence not within the power conferred upon Congress by the commerce clause of the Constitution; (2) because it is prohibited by the Fifth Amendment to the Constitution; (3) the statute unreasonably classifies union laborers and attempts to legislate in their behalf, while no like or corresponding benefits are accorded to non-union laborers; (4) because it is not limited to interstate *employes* of interstate carriers, and therefore the courts can not apply the statute to such employes only, without reading into it words which Congress did not put there, and to do so would be judicial legislation; and, furthermore, to uphold the statute would result in "legalized thraldom—not liberty."

For each and all of these reasons, and upon the authorities cited, we ask the court to hold that the Act of June 1, 1898, is unconstitutional and void to the extent we have indicated; and that it do reverse the judgment of the trial court and remand the case to that court with directions to set aside the judgment of conviction, to sustain the demurrer to the indictment, and to discharge the prisoner.

Respectfully submitted,

BENJAMIN D. WARFIELD,
Counsel for Plaintiff in Error.

HENRY L. STONE,
Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1907.

WILLIAM ADAIR, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 293.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

BRIEF FOR THE UNITED STATES.

STATEMENT OF CASE.

The indictment in this case charged Adair, as an agent and employee of the Louisville and Nashville Railroad Company, a railroad corporation and a common carrier engaged in the interstate transportation of passengers and property, with discriminating against O. B. Coppage, an employee of that company, engaged in train operation and train service as a locomotive fireman in such transportation, because of his membership in a labor organization known as the Order of Locomotive Firemen, by threatening to discharge (second count) and discharging him (first count) because of that fact, in violation of section 10 of the act of Congress of June 1, 1898 (30 Stat., 424).

15045—07——1

A demurrer, the ground of which was the unconstitutionality of the act, was interposed and overruled, Judge Cochran rendering an elaborate opinion (Rec., 7).

The case then went to trial, the jury returning a verdict of guilty as charged in the first count of the indictment, upon which the court entered a judgment and sentence of $100 and costs (Rec., 34), to review which this writ of error was sued out.

The only question raised by the assignments of error that requires notice is the constitutionality of the statute upon which the indictment was founded.

THE STATUTE.

Act of June 1, 1898, c. 370 (30 Stat., 424):

AN ACT Concerning carriers engaged in interstate commerce and their employees.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of this act shall apply to any common carrier or carriers and their officers, agents, and employees, except masters of vessels and seamen, as defined in section forty-six hundred and twelve, Revised Statutes of the United States, engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, for a continuous carriage or shipment, from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States.

The term "railroad," as used in this act, shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term "transportation" shall include all instrumentalities of shipment or carriage. The term "employees" as used in this act shall include all persons actually engaged in any capacity in train operation or train service of any description, and notwithstanding that the cars upon or in which they are employed may be held and operated by the carrier under lease or other contract: *Provided, how-*

ever, That this act shall not be held to apply to employees of street railroads and shall apply only to employees engaged in railroad train service. In every such case the carrier shall be responsible for the acts and defaults of such employees in the same manner and to the same extent as if said cars were owned by it and said employees directly employed by it, and any provisions to the contrary of any such lease or other contract shall be binding only as between the parties thereto and shall not affect the obligations of said carrier either to the public or to the private parties concerned.

SEC. 2. That whenever a controversy concerning wages, hours of labor, or conditions of employment shall arise between a carrier subject to this act and the employees of such carrier, seriously interrupting or threatening to interrupt the business of said carrier, the Chairman of the Interstate Commerce Commission and the Commissioner of Labor shall, upon the request of either party to the controversy, with all practicable expedition, put themselves in communication with the parties to such controversy, and shall use their best efforts, by mediation and conciliation, to amicably settle the same; and if such efforts shall be unsuccessful, shall at once endeavor to bring about an arbitration of said controversy in accordance with the provisions of this act.

SEC. 3. That whenever a controversy shall arise between a carrier subject to this act and the employees of such carrier which can not be settled by mediation and conciliation in the manner provided in the preceding section, said controversy may be submitted to the arbitration of a board of three persons, who shall be chosen in the manner following: One shall be named by the carrier or employer directly interested; *the other shall be named by the labor organization to which the employees directly interested belong,* or, if they belong to more than one, by that one of them which specially represents employees of the same grade and class and engaged in services of the same

nature as said employees so directly interested: *Provided, however,* That when a controversy involves and affects the interests of two or more classes and grades of employees belonging to different *labor organizations* such arbitrator shall be agreed upon and designated by the concurrent action of all such labor organizations; and in cases where the *majority of such employees are not members of any labor organization,* said employees may by a majority vote select a committee of their own number, which committee shall have the right to select the arbitrator on behalf of said employees. The two thus chosen shall select the third commissioner of arbitration; but, in the event of their failure to name such arbitrator within five days after their first meeting, the third arbitrator shall be named by the commissioners named in the preceding section. A majority of said arbitrators shall be competent to make a valid and binding award under the provisions hereof. The submission shall be in writing, shall be signed by the employer and by the *labor organization* representing the employees, shall specify the time and place of meeting of said board of arbitration, shall state the questions to be decided, and shall contain appropriate provisions by which the respective parties shall stipulate, as follows:

First. That the board of arbitration shall commence their hearings within ten days from the date of the appointment of the third arbitrator, and shall find and file their award, as provided in this section, within thirty days from the date of the appointment of the third arbitrator; and that pending the arbitration the status existing immediately prior to the dispute shall not be changed: *Provided,* That no employee shall be compelled to render personal service without his consent.

Second. That the award and the papers and proceedings, including the testimony relating thereto, certified under the hands of the arbitrators, and which shall have the force and effect of a bill of exceptions, shall be filed in the clerk's office of the

circuit court of the United States for the district wherein the controversy arises or the arbitration is entered into, and shall be final and conclusive upon both parties, unless set aside for error of law apparent on the record.

Third. That the respective parties to the award will each faithfully execute the same, and that the same may be specifically enforced in equity so far as the powers of a court of equity permit: *Provided*, That no injunction or other legal process shall be issued which shall compel the performance by any laborer against his will of a contract for personal labor or service.

Fourth. That employees dissatisfied with the award shall not by reason of such dissatisfaction quit the service of the employer before the expiration of three months from and after the making of such award without giving thirty days' notice in writing of their intention so to quit. Nor shall the employer dissatisfied with such award dismiss any employee or employees on account of such dissatisfaction before the expiration of three months from and after the making of such award without giving thirty days' notice in writing of his intention so to discharge.

Fifth. That said award shall continue in force as between the parties thereto for the period of one year after the same shall go into practical operation, and no new arbitration upon the same subject between the same employer and the same class of employees shall be had until the expiration of said one year if the award is not set aside as provided in section four. That as to individual employees not belonging to the labor organization or organizations which shall enter into the arbitration, the said arbitration and the award made therein shall not be binding, unless the said individual employees shall give assent in writing to become parties to said arbitration.

SEC. 4. That the award being filed in the clerk's office of a Circuit Court of the United States, as hereinbefore provided, shall go into practical operation,

and judgment shall be entered thereon accordingly at the expiration of ten days from such filing, unless within such ten days either party shall file exceptions thereto for matter of law apparent upon the record, in which case said award shall go into practical operation and judgment be entered accordingly when such exceptions shall have been finally disposed of either by said Circuit Court or on appeal therefrom.

At the expiration of ten days from the decision of the Circuit Court upon exceptions taken to said award, as aforesaid, judgment shall be entered in accordance with said decision unless during said ten days either party shall appeal therefrom to the Circuit Court of Appeals. In such case only such portion of the record shall be transmitted to the Appellate Court as is necessary to the proper understanding and consideration of the questions of law presented by said exceptions and to be decided.

The determination of said Circuit Court of Appeals upon said questions shall be final, and being certified by the clerk thereof to said Circuit Court, judgment pursuant thereto shall thereupon be entered by said Circuit Court.

If exceptions to an award are finally sustained, judgment shall be entered setting aside the award. But in such case the parties may agree upon a judgment to be entered disposing of the subject-matter of the controversy, which judgment when entered shall have the same force and effect as judgment entered upon an award.

SEC. 5. That for the purposes of this act the arbitrators herein provided for, or either of them, shall have power to administer oaths and affirmations, sign subpœnas, require the attendance and testimony of witnesses, and the production of such books, papers, contracts, agreements, and documents material to a just determination of the matters under investigation as may be ordered by the court; and may invoke the aid of the United States courts to compel witnesses to attend and testify and to produce such

books, papers, contracts, agreements, and documents to the same extent and under the same conditions and penalties as is provided for in the act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, and the amendments thereto.

SEC. 6. That every agreement of arbitration under this act shall be acknowledged by the parties before a notary public or clerk of a District or Circuit Court of the United States, and when so acknowledged a copy of the same shall be transmitted to the chairman of the Interstate Commerce Commission, who shall file the same in the office of said Commission.

Any agreement of arbitration which shall be entered into conforming to this act, except that it shall be executed by employees individually instead of by a labor organization as their representative, shall, when duly acknowledged as herein provided, be transmitted to the chairman of the Interstate Commerce Commission, who shall cause a notice in writing to be served upon the arbitrators, fixing a time and place for a meeting of said board, which shall be within fifteen days from the execution of said agreement of arbitration: *Provided, however*, That the said chairman of the Interstate Commerce Commission shall decline to call a meeting of arbitrators under such agreement unless it be shown to his satisfaction that the employees signing the submission represent or include a majority of all employees in the service of the same employer and of the same grade and class, and that an award pursuant to said submission can justly be regarded as binding upon all such employees.

SEC. 7. That during the pendency of arbitration under this act it shall not be lawful for the employer, party to such arbitration, to discharge the employees, parties thereto, except for inefficiency, violation of law, or neglect of duty; *nor for the organization representing such employees to order*, nor for the employees to unite in, aid, or abet strikes against said employer; nor, during a period of three months after an award under such an arbitration, for such employer to dis-

charge any such employees, except for the causes aforesaid, without giving thirty days' written notice of an intent so to discharge; nor for any of such employees, during a like period, to quit the service of said employer without just cause without giving to said employer thirty days' written notice of an intent so to do; nor for such organization representing such employees to order, counsel, or advise otherwise. Any violation of this section shall subject the offending party to liability for damages: *Provided*, That nothing herein contained shall be construed to prevent any employer, party to such arbitration, from reducing the number of its or his employees whenever in its or his judgment business necessities require such reduction.

SEC. 8. That in every incorporation under the provisions of chapter five hundred and sixty-seven of the United States Statutes of eighteen hundred and eighty-five and eighteen hundred and eighty-six it must be provided in the articles of incorporation and in the constitution, rules, and by-laws that a member shall cease to be such by participating in or by instigating force or violence against persons or property during strikes, lockouts, or boycotts, or by seeking to prevent others from working through violence, threats, or intimidations. Members of such incorporations shall not be personally liable for the acts, debts, or obligations of the corporations, nor shall such corporations be liable for the acts of members or others in violation of law; and such corporations may appear by designated representatives before the board created by this act, or in any suits or proceedings for or against such corporations or their members in any of the Federal courts.

SEC. 9. That whenever receivers appointed by Federal courts are in the possession and control of railroads, the employees upon such railroads shall have the right to be heard in such courts upon all questions affecting the terms and conditions of their employment, *through the officers and representatives*

of their associations, whether incorporated or unincorporated, and no reduction of wages shall be made by such receivers without the authority of the court therefor upon notice to such employees, said notice to be not less than twenty days before the hearing upon the receivers' petition or application, and to be posted upon all customary bulletin boards along or upon the railway operated by such receiver or receivers.

SEC. 10. That any employer subject to the provisions of this act and any officer, agent, or receiver of such employer who shall require any employee, or any person seeking employment, as a condition of such employment, to enter into an agreement, either written or verbal, not to become or remain a member of any labor corporation, association, or organization; or shall threaten any employee with loss of employment, or shall unjustly discriminate against any employee because of his membership in such a labor corporation, association, or organization; or who shall require any employee or any person seeking employment, as a condition of such employment, to enter into a contract whereby such employee or applicant for employment shall agree to contribute to any fund for charitable, social, or beneficial purposes; to release such employer from legal liability for any personal injury by reason of any benefit received from such fund beyond the proportion of the benefit arising from the employer's contribution to such fund; or who shall, after having discharged an employee, attempt or conspire to prevent such employee from obtaining employment, or who shall, after the quitting of an employee, attempt or conspire to prevent such employee from obtaining employment, is hereby declared to be guilty of a misdemeanor, and, upon conviction thereof in any court of the United States of competent jurisdiction in the district in which such offense was committed, shall be punished for each offense by a fine of not less than one hundred dollars and not more than one thousand dollars.

SEC. 11. That each member of said board of arbitration shall receive a compensation of ten dollars per day for the time he is actually employed, and his traveling and other necessary expenses; and a sum of money sufficient to pay the same, together with the traveling and other necessary and proper expenses of any conciliation or arbitration had hereunder, not to exceed ten thousand dollars in any one year, to be approved by the Chairman of the Interstate Commerce Commission and audited by the proper accounting officers of the Treasury, is hereby appropriated for the fiscal years ending June thirtieth, eighteen hundred and ninety-eight, and June thirtieth, eighteen hundred and ninety-nine, out of any money in the Treasury not otherwise appropriated.

SEC. 12. That the act to create boards of arbitration or commission for settling controversies and differences between railroad corporations and other common carriers engaged in interstate or territorial transportation of property or persons and their employees, approved October first, eighteen hundred and eighty-eight, is hereby repealed.

Approved, June 1, 1898.

ARGUMENT.

I.

Section 10 of the act has a clear and direct relation to interstate commerce.

The constitutionality of section 10 is not properly to be determined by considering it separately and apart from the other provisions of the act, as was done by Judge Evans in *United States* v. *Scott* (148 Fed., 431). Considered in the light of the other provisions of the act and the purpose which pervades the entire statute, the relation of section 10 to the subject of interstate commerce is at once apparent.

It is well settled that in construing statutes the whole statute and all of its parts are to be taken together.

In *Pennington* v. *Coxe* (2 Cranch, 34), Chief Justice Marshall, speaking for the court, said (p. 52):

> That a law is the best expositor of itself; *that every part of an act is to be taken into view, for the purpose of discovering the mind of the legislature*, and that the details of one part may contain regulations restricting the extent of general expressions used in another part of the same act, are among those plain rules laid down by common sense for the exposition of statutes which have been uniformly acknowledged.

The act provides for the settlement, by arbitration, of controversies between certain common carriers engaged in interstate and foreign commerce and their employees, the controversies referred to being described as those "concerning wages, hours of labor, or conditions of employment" "*seriously interrupting or threatening to interrupt the business of said carriers.*" (Sec. 2.)

The manifest purpose of the act is the protection of interstate and foreign commerce by the avoidance of strikes, lockouts, etc., which are the forms such interrruptions usually assume.

The history of the act removes any doubt on this point. It was the result of the great railroad strike at Chicago in June–July, 1894. The commission appointed by the President to investigate the causes of that disturbance made its report November 14, 1894, which was transmitted to Congress December 10, 1894, and immediately thereafter various bills, similar in character to that which was finally enacted into law, were introduced. At the request of the House Committee on Labor, Hon. Carroll D. Wright, Commissioner of Labor, and Hon. John D. Kernan, two of the three members of the Chicago Strike Commission, drew an arbitration bill along the lines of the recommendations made by them in their report, which was introduced in the House on December 18, 1894 (H. R. 8259, 53d Cong., 3d sess.).

On January 17, 1895, another bill (H. R. 8556, 53d Cong., 3d sess.), said to have been prepared by

Attorney-General Olney, and which certainly met with his support and approval, as appears from a letter to a member of the House Committee on Labor of that date, was introduced in the House and referred to the Committee on Labor. This bill, which embodied in substance the material provisions contained in the act finally passed, including the section here in question, was passed by the House, but failed to pass the Senate owing to the lateness of the session. The House, in the Fifty-fourth Congress, again passed a like bill (H. R. 268), but it again failed to pass the Senate for the same reason. Similar bills were introduced at the first session of the Fifty-fifth Congress (S. 122, 1014; H. R. 61); and finally, at the second session of that Congress, like measures were introduced in both House and Senate (H. R. 4372; S. 3662) and enacted into the present law.

In reporting the Senate bill (S. Rept. 591, 55th Cong., 2d sess.), the Senate Committee on Labor said:

> The Committee on Education and Labor, having had under consideration the bill (S. 3662) "Concerning carriers engaged in interstate commerce and their employees," respectfully report as follows:
>
> The measure under consideration may properly be called a voluntary arbitration bill, having for its object the settlement of disputes between capital and labor as far as the interstate transportation companies are concerned. The necessity for the bill

arises from the calamitous results, in the way of ill-considered strikes arising from the tyranny of capital or the unjust demands of labor organizations, whereby the business of the country is brought to a standstill and thousands of employees, with their helpless wives and children, are confronted with starvation.

Bills similar to this have twice passed the House of Representatives with little objection from railway corporations or the organizations representing their employees. The latter appeared through their representatives and were given a full hearing by your committee. The views of these men, together with a strong letter from Mr. Edward A. Moseley, secretary of the Interstate Commerce Commission, who also addressed the committee, are subjoined.

It is our opinion that this bill, should it become a law, would reduce to a minimum labor strikes which affect interstate commerce, and we therefore recommend its passage.

The House Committee on Labor, in reporting the House bill (H. Rept. 454, 55th Cong., 2d sess.), said:

Bills similar to this have twice before received the unanimous approval of the committee and twice passed the House of Representatives, but in each case too late to receive consideration in the Senate.

It is still true, as stated in a former report, that the proposition that public opinion is in favor of arbitration need not be discussed. It

> is universally conceded. Persons engaged in interstate commerce, who are most affected by the bill under consideration, have been anxious to secure the enactment into law of such measure as would operate justly, and effectively put an end to the industrial wars that have resulted from disputes growing out of the questions of wages, hours of labor, and the conditions of employment between the employer and the employee.

These reports are set out in full at end of brief (Appendixes I and II).

The propriety of referring to the history of the act in order to arrive at the intention of Congress is well illustrated by the case of *Church of the Holy Trinity* v. *United States* (143 U. S., 457).

It may also be observed that the arbitration act of October 1, 1888 (25 Stat., 501), under the authority of which the Chicago strike commission was appointed and which is repealed by the present act, was also the result of similar disturbances upon the railroads engaged in interstate commerce.

The present statute, while providing only for voluntary arbitration, goes further than the prior act in several respects. The award of the arbitrators was to be enforced under the prior act entirely through the pressure of public opinion, while under the present statute the courts may, with certain restrictions, decree specific performance of an award properly made and filed. The present act also imposes certain limitations upon the power of the employer to dis-

miss its employees on account of dissatisfaction with an award and upon the right of the employees to quit its service for that reason.

But the difference most to be emphasized for the purpose here in view is that the present statute recognizes and deals not simply with individual employees, but with the *organizations of labor* to which they may belong. It provides (sec. 3) that one of the three members of the arbitration board shall be named by the labor organization or organizations to which the employees concerned may belong, the only provision for the representation of individual employees upon such board being where the majority of the employees concerned are not members of any organization. So, in section 7, which imposes restrictions upon the employers discharging employees pending arbitration or after award, it is provided "that it shall not be lawful *for the organization* representing such employees to order, nor for the employees to unite in, aid, or abet, strikes against said employer."

Again, in section 8, it is provided that organizations incorporated under authority of the United States must provide in their articles of incorporation and their constitutions, rules, and by-laws that a member shall "cease to be such by participating in or by instigating force or violence against persons or property during strikes, lockouts, or boycotts, or by seeking to prevent others from working through violence, threats, or intimidations."

15045—07——3

Section 9 gives employees of railroads in the hands of receivers appointed by Federal courts the right to be heard "upon all questions affecting the terms and conditions of their employment *through the officers and representatives of their associations.*"

Then follows section 10, forbidding any employer subject to the provisions of the act—that is, common carriers engaged in interstate and foreign commerce wholly by railroad or partly by railroad and partly by water—or any officer, agent, or receiver of such employer, from requiring any employee or any person seeking employment, as a condition of such employment, to enter into any agreement, either written or verbal, not to become or remain a member of any labor corporation, association, or organization, or to threaten any employee with loss of employment or unjustly discriminate against him because of his membership in a labor corporation, association, or organization, etc.

There seems to be but one interpretation to put upon all this. Congress was seeking to prevent the interruption of interstate commerce upon the lines of the carriers referred to resulting from strikes, lockouts, etc. It recognized the fact that such interruptions were not apt to assume serious proportions unless the employees were members of labor organizations and the latter became involved in it. The Chicago strike was an illustrative case. As pointed out by the strike commission in their report, the quitting of the employees of the Pullman Company at Pullman did not disturb interstate commerce until

the American Railway Union, which they had recently joined, ordered a boycott of Pullman cars by employees upon the railroad lines terminating in Chicago. Congress also recognized the fact that discrimination against employees because of their membership in a labor organization was calculated to bring on such disturbances. For the purpose, therefore, of preventing these interruptions, it provided means for the arbitration of disputes between the carriers and their employees through the labor organizations to which the latter belonged, and forbade discrimination against employees because of their membership in such organizations.

The relation of the inhibitions in section 10 to the general scheme for the protection of interstate commerce embodied in the act against interruption by strikes, lockouts, etc., is therefore apparent. The question then is reduced to this, Has Congress the constitutional authority so to regulate the business of a common carrier engaged in interstate commerce as adequately to protect and safeguard the interests of such commerce?

It is respectfully submitted that the authorities require an affirmative answer to this question.

II.

Congress may regulate the business of common carriers engaged in interstate commerce so far as it is necessary to protect and promote that commerce.

The decisions of this court as to the power of Congress to regulate interstate and foreign commerce, from *Gibbons* v. *Ogden* (9 Wheat.,

1), down to the *Lottery case* (188 U. S., 321, 347), where it was held to extend to the absolute prohibition of certain articles from such commerce, have been rested upon the definition of the scope of that power given by Chief Justice Marshall in the case first cited (9 Wheat., 197):

> We are now arrived at the inquiry, What is this power? It is the power to regulate—that is, to prescribe the rule by which commerce is to be governed. *This power*, like all others vested in Congress, *is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than those prescribed in the Constitution.* These are expressed in plain terms and do not affect the questions which arise in this case or which have been discussed at bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations and among the several States *is vested in Congress as absolutely as it would be in a single government*, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States.

The only limitation in the Constitution in any way applicable to this case is the provision of the Fifth amendment forbidding the deprivation of liberty without due process of law, it being contended that the statute in question is an unconstitutional interference with the carrier's liberty.

The decisions referred to, however, conclusively establish these two propositions:

1. That the right of individuals or corporations to make contracts and do business is at all times subservient to the power of Congress to regulate interstate commerce.

2. That common carriers are subject to greater control than private individuals by the State or Congress (according as their business is local or interstate), on account of the public nature of such business.

No better illustration of the power of Congress to regulate the subject of private contracts and private business in the interests of interstate commerce could be given than the Federal antitrust act of July 2, 1890, which declares *every* contract in restraint of trade or commerce among the several States or with foreign nations illegal and provides the penalty of fine or imprisonment for making or entering into any such contract.

This law has been adjudged constitutional and held to forbid, not only contracts which were in unreasonable restraint of interstate trade and commerce, but those which were reasonable in their nature.

United States v. *Trans-Missouri Freight Association*, 166 U. S., 290.

United States v. *Joint Traffic Association*, 171 U. S., 505.

Addyston Pipe and Steel Co. v. *United States*, 175 U. S., 211.

United States v. *Northern Securities Company*, 193 U. S., 197.

United States v. *Swift & Company*, 196 U. S., 375.

In *United States* v. *Joint Traffic Association*, the court said (171 U. S., 569):

> Has not Congress, with regard to interstate commerce and in the course of regulating it in the case of railroad corporations, the power to say that no contract or combination shall be legal which shall restrain trade and commerce by shutting out the operation of the general law of competition? We think it has.

Again (p. 571):

> The prohibition of such contracts may, in the judgment of Congress, be one of the reasonable necessities for the proper regulation of commerce, *and Congress is the judge of such necessity and propriety*, unless, in case of a possible gross perversion of the principle, the courts might be applied to for relief.

Replying to the contention that the statute interfered with the citizen's liberty of contract secured by the Constitution, the court said (pp. 572–573):

> The cases cited by the respondent's counsel in regard to the general constitutional right of the citizen to make contracts relating to his lawful business are not inconsistent with the existence of the power of Congress to prohibit contracts of the nature involved in this case. The power to regu-

late commerce has no limitation other than those prescribed in the Constitution.

* * * * *

The case of *Allgeyer* v. *Louisiana* (165 U. S., 578) is cited as authority for the statement concerning the right to contract. In speaking of the meaning of the word "liberty," as used in the fourteenth amendment to the Constitution, it was said in that case to include, among other things, the liberty of the citizen to pursue any livelihood or vocation, and for that purpose to enter into all contracts which might be proper, necessary, and essential to his carrying out those objects to a successful conclusion.

We do not impugn the correctness of that statement. The citizen may have the right to make a proper (that is, a lawful) contract, one which is also essential and necessary for carrying out his lawful purposes. The question which arises here is whether the contract is a proper or lawful one, and we have not advanced a step toward its solution by saying that the citizen is protected by the fifth or any other amendment in his right to make proper contracts to enable him to carry out his lawful purposes. We presume it will not be contended that the court meant, in stating the right of the citizen "to pursue any livelihood or vocation," to include every means of obtaining a livelihood, whether it was lawful or otherwise. Precisely how far a legislature can go in declaring a certain means of obtaining a livelihood unlawful it is unnecessary here

> to speak of. It will be conceded it has power to make some kinds of vocations and some methods of obtaining a livelihood unlawful, and in regard to those the citizen would have no right to contract to carry them on.
>
> Congress may restrain individuals from making contracts under certain circumstances and upon certain subjects. (*Frisbie* v. *United States*, 157 U. S., 160.)
>
> Notwithstanding the general liberty of contract which is possessed by the citizen under the Constitution, we find that there are many kinds of contracts which, while not in themselves immoral or *mala in se*, may yet be prohibited by the legislation of the States or, in certain cases, by Congress. The question comes back whether the statute under review is a legitimate exercise of the power of Congress over interstate commerce and a valid regulation thereof. The question is, for us, one of power only, and not of policy. We think the power exists in Congress and that the statute is therefore valid.

In *Addyston Pipe and Steel Company* v. *United States* the constitutionality of the antitrust act was again assailed on the ground of interfering with the citizen's liberty of contract, but the court overruled it upon the grounds above indicated.

As stated, the decisions of this court hold that a common carrier is subject to peculiar control by the State or Congress according as its business is local or interstate, because of the public nature of its business.

This principle is well stated by Mr. Justice Field in Charlotte, etc., *Railroad* v. *Gibbes*, 142 U. S., 386, 393:

> Though railroad corporations are private corporations, as distinguished from those created for municipal and governmental purposes, their uses are public. They are formed for the convenience of the public in the transportation of persons and merchandise and are invested for that purpose with special privileges. They are allowed to exercise the State's right of eminent domain that they may appropriate for their uses the necessary property of others upon paying just compensation therefor, a right which can only be exercised for public purposes. And they assume, by the acceptance of their charters, the obligations to transport all persons and merchandise upon like conditions and at reasonable rates, and they are authorized to charge reasonable compensation for the services they thus perform. Being the recipients of special privileges from the State, to be exercised in the interest of the public and assuming the obligations thus mentioned, their business is deemed affected with a public use, and to the extent of that use is subject to legislative regulation. (*Georgia Railroad & Banking Co.* v. *Smith*, 128 U. S., 174, 179.) That regulation may extend to all measures deemed essential not merely to secure the safety of passengers and freight, but to promote the convenience of the public in the transaction of business with them

> and to prevent abuses by extortionate charges and unjust discrimination. It may embrace a general supervision of the operation of their roads, which may be exercised by direct legislation commanding or forbidding, under severe penalties, the doing or omission of particular acts, or it may be exercised through commissioners specially appointed for that purpose. The mode or manner of regulation is a matter of legislative discretion.

It has been repeatedly recognized that when the business of the carrier is interstate, the power of the State to control the conduct of its business in the interest of the public health, safety, or convenience is subject to the paramount right of Congress over the subject, which may displace all State regulations by legislation of its own.

> *Gibbons* v. *Ogden*, 9 Wheat., 1, 210.
> *Nashville, etc., Railway* v. *Alabama*, 128 U. S., 96.
> *Hennington* v. *Georgia*, 163 U. S., 299, 317.
> *New York, New Haven & Hartford Railway Company* v. *New York*, 165 U. S., 628, 631.
> *Reid* v. *Colorado*, 187 U. S., 137.

In *Nashville, etc., Railway* v. *Alabama*, which involved the validity of a statute of the State requiring locomotive engineers, firemen, conductors, brakemen, etc., to undergo medical examination to discover whether their sight was good, and which disqualified persons afflicted with color blindness or defective vision from serving in such capacities on trains, the court said (128 U. S., 99):

> It is conceded that the power of Congress to regulate interstate commerce is plenary; that, as incident to it, Congress may legislate as to the qualifications, duties, and liabilities of employees and others on railway trains engaged in that commerce, and that such legislation will supersede any State action on the subject. *But until such legislation is had*, it is clearly within the competency of the State to provide against accidents on trains whilst within their limits.

So in *New York, New Haven and Hartford Railroad Company* v. *New York*, the court said (165 U. S., 631):

> According to numerous decisions of this court (some of which are cited in the margin) sustaining the validity of State regulations enacted under the police powers of the State, and which incidentally affected commerce among the States and with foreign nations, it was clearly competent for the State of New York, *in the absence of national legislation covering the subject*, to forbid under penalties the heating of passenger cars in that State, by stoves or furnaces kept inside the cars or suspended therefrom, although such cars may be employed in interstate commerce. *While the laws of the States must yield to acts of Congress passed in execution of the powers conferred upon it by the Constitution* (*Gibbons* v. *Ogden*, 1 Wheat., 1, 211), the mere grant to Congress of the power to regulate commerce with foreign nations and among the States did not, of itself and without legislation by Congress, impair the authority of the States to establish

> such reasonable regulations as were appropriate for the protection of the health, the lives, and the safety of their people.

No greater exercise of the power of the legislature over common carriers and other utilities of a public nature could well be made than that of regulating the rates which they may charge. The right of the State so to do was affirmed in the so-called Granger cases, reported in 94 U. S., 113, et seq.

In *Wabash, St. Louis and Pacific Railway Company* v. *Illinois* (118 U. S., 557) the court limited the right of the State to make such regulations to local transportation, holding that the regulation of rates for interstate transportation was exclusively within the control of Congress, and that the matter was not one of those which the State could control in the absence of legislation by Congress. The only fair interpretation of this decision is that Congress may regulate the rates of railroads engaged in interstate commerce.

In *Baltimore and Ohio Railroad Company* v. *Baugh* (149 U. S., 368) it was held that the question whether an engineer and fireman upon a locomotive running upon the railroad were fellow-servants was a question of general and not local law, because it was one in which the whole country was interested, the court in this connection observing (pp. 378–379):

> It enters into the commerce of the country. Commerce between the States is a matter of national regulation, and to establish it as such

was one of the principal causes which led to the adoption of our Constitution. To-day the volume of interstate commerce far exceeds the anticipation of those who framed the Constitution, and the main channel through which the interstate commerce passes are the railroads of the country. Congress has legislated in respect to this commerce by the interstate commerce act and its amendments (24 Stats., 379, c. 104), but also by an act passed at the last session, requiring the use of automatic couplers on freight cars (Public Acts, 52d Cong., 2d sess., c. 113). The lines of this very plaintiff in error extend into half a dozen or more States, and its trains are largely employed in interstate commerce. As it passes from State to State, must the rights, obligations, and duties subsisting between it and its employees change at every State line? If to a train running from Baltimore to Chicago it should, within the limits of the State of Ohio, attach a car for a distance only within that State, ought the law controlling the relation of a brakeman on that car to the company to be different from that subsisting between the brakeman on the through car and the company? Whatever may be accomplished by statute—and of that we have now nothing to say—it is obvious that the relations between the company and employee are not, in any sense of the term, local in character, but are of the general nature and to be determined by the general rules of the common law.

Of course, being "a matter of national regulation," the general rules of the common law are subject to change by Congress.

Although the Supreme Court has held that the act to regulate commerce did not confer upon the Interstate Commerce Commission the power to fix rates (*Cincinnati, etc., Railway* v. *Interstate Commerce Commission*, 162 U. S., 184; *Interstate Commerce Commission* v. *Cincinnati, etc., Railway*, 167 U. S., 479), in so doing it plainly recognized the plenary authority of Congress over the matter.

In *Johnson* v. *Southern Pacific Company* (196 U. S., 1) the court construed and applied the safety-appliance act of March 2, 1893. That case illustrates these two propositions: (1) That Congress may change the common-law rules of liability between master and servant in respect to common carriers engaged in interstate commerce; (2) that Congress may legislate for the protection of employees of common carriers engaged in interstate commerce.

In its opinion in that case the court said:

> The present case is that of an injured employee, and involves the application of the act in respect of automatic couplers, the preliminary question being whether locomotives are required to be equipped with such couplers. * * * *Now it was as necessary for the safety of employees* in coupling and uncoupling that locomotives should be equipped with automatic couplers as it was that freight and passenger and dining cars should be, perhaps more so, as Judge Thayer suggests, "since engines have occasion to make couplings more frequently."

Following the decision in the Johnson case, the United States District Court for the Eastern District of Washington (*United States* v. *Great Northern Railway Company*, 145 Fed., 438) held that the safety-appliance act of 1893, as amended by the acts of April 1, 1896, chapter 87, and March 2, 1903, chapter 976, applied to all cars regularly used on any railroad engaged in interstate commerce, not only while actually in use in such commerce, but at all times when in use on such road. In that case the court said:

> The title of the act of 1893 fully reflects the legislative intent as expressed in the act, and it is manifest that the purpose in view was the regulation of commerce between the States by requiring common carriers to conform to certain requirements regarded as essential to the safety of employees and passengers. To sustain the demurrer would be to hold that it is beyond the power of Congress to control the instrumentalities through which interstate commerce may be carried on. But the prerogative necessarily carries with it the authority to prescribe the rules and regulations which shall apply to those engaged in it. Illustrations of the futility of any effort on the part of Congress to exercise its constitutional powers in this regard, if the contention made by the defendant can be sustained, are not far to seek. An interstate carrier might haul traffic from one State to another, there transfer it, and from thence transport it, without any of the safety appliances provided by law.

> If it be answered that this would be an evasion of the law, the result is susceptible of further illustration. Cars containing State traffic could be commingled with those containing interstate traffic, and thus defeat the purposes of the legislation upon the subject. The effect of this would be to endanger the train engaged in interstate traffic. Again, a carrier could use trains engaged entirely in State traffic upon its lines without the requisite equipment, which might result in injury to passengers by coming in collision with a train engaged in interstate traffic. It is the carrier which the acts seeks to regulate, and it is by this method that Congress has undertaken to bring the matter under control.

The cases above referred to are simply an extension to interstate commerce by land of the principles theretofore enumerated by the Supreme Court in reference to interstate commerce by water. Prior to the construction of railroads the plenary power of Congress over the navigable waters of the United States and the agencies and instrumentalities of interstate commerce thereon had been firmly established, and later cases confirm its power in that regard.

Gibbons v. *Ogden*, 9 Wheat., 1.
United States v. *Coombs*, 12 Pet., 72.
Waring v. *Clarke*, 5 How., 441.
Sinnot v. *Davenport*, 22 How., 240.
Gilman v. *Philadelphia*, 3 Wall., 713.
The Daniel Ball, 10 Wall., 557.
Bridge Company v. *United States*, 105 U. S., 470.

Escanaba Company v. *Chicago*, 107 U. S., 678.
Willamette Iron Bridge Co. v. *Hatch*, 125 U. S., 1.
United States v. *Bellingham Bay Boom Co.*, 176 U. S., 211.

These cases affirm the right of Congress to license, inspect, and control vessels engaged in interstate commerce upon the navigable waters of the United States, and to exercise exclusive control over such highways in the interest of commerce and regulation thereon.

In the *Lottawanna case* (21 Wall., 558), which related to a lien upon a vessel for wages, salvage, etc., the court, referring to maritime law of the United States, said (p. 576–577):

> But we must always remember that the court can not make the law, it can only declare it. If, within its proper scope, any change is desired in its rules, other than those of procedure, it must be made by the legislative department. It can not be supposed that the framers of the Constitution contemplated that the law should forever remain unalterable. *Congress undoubtedly has authority under the commercial power*, if no other, to introduce such changes as are likely to be needed. The scope of the maritime law and that of commercial regulations are not coterminous, it is true, but the latter embraces much the largest portion of ground covered by the former. Under it Congress has regulated the registry, enrollment, license, and

> nationality of ships and vessels; the method of recording bills of sale and mortgages thereon; the rights and duties of seamen; the limitations of the responsibility of shipowners for the negligence and misconduct of their captains and crews, and many other things of a character truly maritime.

See also *Sherlock* v. *Alling* (93 U. S., 99, 104), where the court said (p. 103):

> It is true the commercial power conferred by the Constitution is one without limitation. It authorizes legislation with respect to all the subjects of foreign and interstate commerce and the instruments by which it is carried on.

In *Gloucester Ferry Co.* v. *Pennsylvania* (114 U. S., 196) the court said (pp. 203–204):

> The power to regulate that [interstate] commerce, as well as commerce with foreign nations, is the power to prescribe the rules by which it shall be governed, that is, the condition upon which it shall be conducted; to determine when it shall be free and when subject to duties or other exactions. The power also embraces within its control all the instrumentalities by which that commerce may be carried on. The subjects, therefore, upon which the power may be exerted are of infinite variety.

As stated in *Pensacola Telegraph Company* v. *Western Union Telegraph Company* (96 U. S., 1), the power of Congress over interstate commerce is not confined to the instrumentalities of such commerce known and in use when the Constitution was adopted,

but extends to new means and agencies as they are developed.

In *Pennsylvania R. R. Company* v. *Hughes* (191 U. S., 477) the court recognized the right of Congress to regulate the liability of a railroad company upon contracts of interstate transportation. It was held, however, that it had not done so in the interstate commerce law, and that in the absence of legislation on its part the matter could be regulated by the State. In delivering the opinion the court said (p. 487):

> It may be assumed that under the broad power conferred upon Congress over interstate commerce as defined in repeated decisions of this court, it would be lawful for that body to make provision as to contracts for interstate carriage, permitting the carrier to limit its liability in a particular sum in consideration of lower freight rates for transportation. But upon examination of the terms of the law relied on we fail to find any such provision therein.

It is interesting to observe in this connection that the constitutionality of the statutes of the United States limiting the liability of owners of vessels navigating the waters of the United States for the embezzlement, loss, or destruction of property, goods, and merchandise shipped therein, has been rested upon the commerce clause of the Constitution (*Lord* v. *Steamship Co.*, 102 U. S., 541; The *Katie*, 40 Fed., 480), although in *In re Garnett* (141 U. S., 1) the court held that it was unnecessary to consider the power of Con-

gress under that clause, as the statutes were to be regarded as amendments of the maritime law, which was necessarily under the control of Congress.

Perhaps the most striking illustration of the extent of the power of Congress to regulate common carriers by railroad engaged in interstate commerce is furnished by the decision of the Supreme Court in *New York, New Haven and Hartford Railroad Company* v. *Interstate Commerce Commission* (200 U. S., 361). In that case the Supreme Court held, in effect, that Congress could prohibit such a carrier from engaging in any business that would conflict with its duties as a carrier. The point decided was that it was a violation of the spirit, if not the language, of the act to regulate commerce for a railroad operating coal mines to contract to sell and transport such commodity at a price which was not sufficient to pay the cost of the coal at the mines and the expense of delivery, including the published freight rate. In the course of the opinion the court said (p. 399):

> It is urged that if the requirement of the act to regulate commerce as to the maintenance of published rates and the prohibitions of that act against undue preferences and discriminations be applied to a carrier when engaged in buying and selling a commodity which it transports, the substantial effect will be to prohibit the carrier from becoming a dealer when no such prohibition is expressed in the act to regulate commerce,

and hence a prohibition will be implied which should only result from express action by Congress. Granting the premise, the deduction is unfounded. Because no express prohibition against a carrier who engages in intersate commerce becoming a dealer in commodities moving in such commerce is found in the act, it does not follow that the provisions which are expressed in that act should not be applied and be given their lawful effect. Even, therefore, if the result of applying the prohibitions as we have interpreted them will be practically to render it difficult, if not impossible, for a carrier to deal in commodities, this affords no ground for relieving us of the plain duty of enforcing the provisions of the statute as they exist. This conclusion follows, since the power of Congress to subject every carrier engaging in interstate commerce to the regulations which it has adopted is undoubted.

III.

There is no invasion of the carrier's liberty by this statute.

The decisions above referred to fully maintain the proposition that the liberty enjoyed by a common carrier is at all times subject to the control of Congress in the interests of interstate commerce.

The authorities cited further show that Congress has the right to control common carriers engaged in interstate commerce in the matter of the selection of their employees so far as it may be necessary for the protection of such commerce and

the persons engaged in it, whether as shippers, passengers, or employees.

Counsel rely on certain decisions, holding that a State had no authority to enact legislation forbidding discrimination by employers against members of labor organizations. (*Gillespie* v. *The People*, 188 Ill., 176; *State* v. *Julow*, 129 Mo., 163; *State* v. *Kreutzerberg* (Wisconsin), 90 N. W. Rep., 1098.)

The correctness of these decisions may be doubted. Such statutes do not deprive the employer of any lawful right. They simply protect the rights of the employees against invasion by the employer. The alleged right of the employer is a right to interfere with the liberty of his employees because they are in his service.

In *Davis* v. *State* (30 Ohio Law Journal, 342; 11 Ohio Dec. Reprint, 894) the Court of Common Pleas of Hamilton County held a similar statute of that State constitutional. The court there said:

> It is claimed on the part of the plaintiff in error that this law is in violation of section 1 of the bill of rights, under which all men have the inalienable right of acquiring, possessing, and protecting property. * * * The statute prohibits an employer from coercing his employee. * * * The terms of the statute are not definite; but considering all of its parts, it is the meaning of the statute, as I construe it, that an employer shall not coerce or attempt to coerce his employee from belonging to a lawful labor organization, *i. e.*, shall not coerce him to quit such organization by discharging

> or threatening to discharge such employee. I do not think this takes away from the employer the right to discharge his employee. *He may discharge him for any reason, but he shall not attempt to coerce him to quit the labor organization.*

The right of workingmen to form associations for their mutual advantage can not be denied. It is recognized by both national and State law, and is as much a part of the liberty which all State constitutions are intended to secure as the right to affiliate with political or religious organizations. Will it be said that a State could not prevent employers from interfering with the political and religious liberty of their employees?

But the State cases are distinguishable upon other grounds.

It will be observed that the statutes referred to in the cases cited were general in their nature, applying to all corporations and employers, and were enacted by the State directly for the benefit of organized labor. In the present case, however, the act of Congress in question was not primarily enacted for the benefit of organized labor, but for the protection of interstate commerce, and it does not relate to all classes of employers, but only to a particular class—common carriers engaged in interstate commerce—whose business is of a public nature and requires special supervision for the protection of interstate commerce.

The State laws referred to might, perhaps, be held to be class legislation; but an act of Congress passed for the protection of interstate commerce is still nothing more nor less than a regulation of commerce, although it may incidentally advance the interests of a certain class.

While the act in question will have the effect of protecting labor organizations and their members, such is not to be deemed its primary object. As heretofore shown, its main purpose is to protect interstate commerce by preventing strikes, lockouts, etc. That Congress, at the same time, may have incidentally sought to benefit organized labor is immaterial.

IV.

Policy of legislation not for court—Present statute not arbitrary or unreasonable.

As held in *United States* v. *Joint Traffic Association*, above cited, the courts have nothing to do with the policy of legislation, the only question for them being as to the power of Congress over the subject.

It is true that in that case it was intimated that the courts might perhaps be applied to for relief "in case of a possible gross perversion of the principle"—that Congress was the judge of the necessity and propriety of legislation for the proper protection of interstate commerce. But will it be said that a statute which merely seeks to prevent an interference by the carrier with its employees' right to join labor organizations, because of the deleterious

effect such action may have on interstate commerce, is a gross perversion of such principle?

The distinction between this case and that of *Lochner* v. *New York* (198 U. S., 45) is apparent. In that case a substantial right of the citizen was involved—namely, the right to labor as long as he pleased for his daily bread, an interference with which could only be justified by grave public necessity. And yet in that case four members of the court were of opinion that the statute in question was a proper exercise of the police power of the State.

In the present case no substantial right of the carrier is sought to be interfered with; all that is attempted to be done is to restrain undue interference with the employee's liberty, in order to secure the peace and tranquillity of interstate commerce. Is the right to discriminate against and blacklist an employee because of his membership in a labor organization a grave constitutional privilege of the carrier which the courts should be zealous to protect?

The cases in which the court held State statutes unconstitutional were all cases in which substantial rights of citizens were arbitrarily and unreasonably interfered with. The present act of Congress is not of that nature.

V.

The Federal Government may protect interstate commerce against all obstructions and disturbances, whether by capital or labor.

The plenary authority of the Federal Government to protect interstate commerce and the transmission of the United States mails against interruption and obstruction of all sorts, including strikes, boycotts, etc., is illustrated by the case of *In re Debs.* (158 U. S., 564.) Debs and others, officers of the American Railway Union, were, in effect, enjoined from ordering members of the union to strike and boycott. The court upheld the jurisdiction of the Circuit Court which issued the injunction, and in so doing asserted the plenary authority of the Federal Government not only by military force and by criminal prosecution, in which trial by jury would be had, but by the civil process of the courts (a violation of which might be punished by fine and imprisonment of the offender) to maintain its supremacy and protect its jurisdiction upon every foot of American soil.

So, in *In re Lennon* (166 U. S., 548), the court sustained the jurisdiction of the Circuit Court in punishing an engineer for quitting his post in violation of its order enjoining the boycott of the cars of another railway company.

Shall it be said that while the jurisdiction of the Federal Government to protect interstate commerce and the transmission of the mails against obstruction by railroad employees and the associations to which they belong is full and complete, it is powerless to re-

strain the carrier itself from committing acts calculated to bring about such disturbances?

In *Arthur* v. *Oakes* (63 Fed., 310) Mr. Justice Harlan, on the circuit, in discussing the rule that equity will not compel specific performance of personal services by employees, said (pp. 318–319):

> It is supposed that these principles are inapplicable or should not be applied in the case of employees of a railroad company, which, under legislative sanction, constructs and maintains a public highway primarily for the convenience of the people, and in the regular operation of which the public are vitally interested. Undoubtedly the simultaneous cessation of work by any considerable number of the employees of a railroad corporation, without previous notice, will have an injurious effect, and for a time inconvenience the public. But these evils, great as they are, and although arising in many cases from the inconsiderate conduct of employees and employers, both equally indifferent to the general welfare, *are to be met and remedied by legislation restraining alike employees and employers so far as necessary adequately to guard the rights of the public as involved in the existence, maintenance, and safe management of public highways. In the absence of legislation to the contrary*, the right of one in the service of a quasi public corporation to withdraw therefrom at such time as he sees fit, and the right of the managers of such a corporation to discharge an employee from service whenever they see fit, must be deemed

> so far absolute that no court of equity will compel him, against his will, to remain in such service, or actually to perform the personal acts required in such employments, or compel such managers, against their will, to keep a particular employee in their service.

VI.

Principle of the trade-mark cases not applicable.

The trade-mark law was declared invalid because not limited to trade-marks used in interstate or foreign commerce.

In that case the court said (100 U. S., 96):

> When, therefore, Congress undertakes to enact a law which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the law, or from its essential nature, that it is a regulation of commerce with foreign nations, or among the several States, or with the Indian tribes. If it is not so limited, it is in excess of the power of Congress. If its main purpose be to establish a regulation applicable to all trade, to commerce at all points, especially if it be apparent that it is designed to govern commerce wholly between citizens of the same States, it is obviously the exercise of a power not confided to Congress.

The title of the act here in question is "An act concerning carriers engaged in interstate commerce and their employees." The provisions of the act are made to apply to "any common carrier or carriers and their officers, agents, and employees * * * en-

gaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, for a continuous carriage or shipment from one State or Territory of the United States, or the District of Columbia, to any other State or Territory," etc. (Sec. 1.)

Here is an express limitation of the provisions of the act to common carriers and their employees engaged in interstate commerce, and when we come to section 10 we find that it only applies to "any employer subject to the provisions of this act and any officer, agent, or receiver of such employer."

The term "employee" as used in the act is declared to include "all persons actually engaged in any capacity in train operation or train service of any description." (Sec. 1.)

The evident purpose of Congress was to restrict the provisions of the act to those classes of employees intimately connected with interstate transportation, the striking of whom would immediately interrupt and embarrass such commerce.

The test prescribed in the Trade-mark cases is that an act of Congress, which can be valid only as a regulation of commerce, must show *on its face*, or from its essential nature, that it is a regulation of commerce between the States, etc. Clearly, then, if such an act, *on its face*, is so limited, the courts can not go outside of the statute and consider situations and conditions which may possibly exist under which the statute might perhaps be construed to extend to local commerce.

In the present case the statute, *on its face*, is limited to common carriers and their officers, agents, and employees engaged in interstate commerce. It would have made no difference if Congress had said, as it did in the employers' liability act, now before the court, common carriers engaged in interstate commerce and their officers, agents, and employees. Whichever way it is put, it means the same thing. If the common carrier referred to is one that is engaged in interstate commerce, necessarily, as such carrier acts only through its officers, agents, and employees, the latter must likewise be so engaged.

But, it will be said, it is a well-known fact that common carriers by railroad engaged in interstate commerce are also engaged in local commerce, and therefore such a statute would also embrace its local business. The premise of this syllogism, however, is not correct. It is not the common carrier engaged in interstate commerce which is also engaged in local commerce, but the person or corporation that owns or operates such carrier. Such a corporation may be conducting both a local and an interstate business, and thus possess a dual character as a common carrier, but when Congress legislates with respect to its business as an interstate carrier, it can not be said to be regulating its business as a local carrier. A railroad corporation may not only be engaged in local and interstate transportation, but in the mining of coal or the manufacture of machinery. It would be just as logical to say that a statute, applying only to

common carriers engaged in interstate commerce and their officers, agents, and employees, applied to the mining or manufacturing business of such a corporation, as that it applied to its local business.

It is the common carrier engaged in interstate commerce and its officers, agents, and employees to which the statute in question applies, and not the corporation and its officers, agents, and employees generally, which may be conducting, among other things, the business of an interstate carrier.

This distinction is recognized in the indictment in this case, the Louisville and Nashville Railroad Company being described in the indictment as "a railroad corporation, duly organized and existing by law, *and* a common carrier engaged in the transportation of passengers and property wholly by steam railroad for a continuous carriage or shipment from one State of the United States to another State," and at the time of the commission of the offense charged "a common carrier of interstate commerce and an employer subject to the provisions of" the act in question. The defendant, Adair, is described as an agent and employee of said common carrier and employer, and Coppage, the employee discharged, as an employee of said common carrier and employer in the district aforesaid, and as such employee * * * actually engaged in the capacity of locomotive fireman in train operations and train service for said common carrier and employer in the transportation of passengers and property aforesaid.

The indictment thus recognizes the fact that the act relates only to the business of the Louisville & Nashville Railroad Company as a common carrier engaged in interstate trade and transportation, and its officers, agents, and employees engaged therein.

The fact that the same instrumentality may also be a medium of intrastate commerce is immaterial. By entering the field of interstate commerce a railroad corporation subjects itself to the control of Congress, which may pass all proper regulations for the conduct of its business as an interstate carrier irrespective of the fact that such regulations may, perhaps, incidentally affect the local transportation business of the corporation.

It is to be observed that, from *Gibbons* v. *Ogden* down, the Supreme Court, in delimiting the power of Congress, has been careful to say that it did not extend to the regulation of the "purely" or "completely" internal commerce of a State. A regulation of interstate commerce incidentally affecting intrastate commerce can not fairly be said to come within this limitation.

It seems unnecessary to call the attention of the court to the well-established principle that a statute should not be declared unconstitutional unless clearly beyond the jurisdiction of the legislature to enact. Certainly an act of Congress intended to prevent interruptions of the great commercial and postal systems of the country by allaying the strife between

capital and labor concerned therein is not lightly to be struck down.

It is respectfully submitted that the judgment of the District Court should be affirmed.

CHARLES J. BONAPARTE,
Attorney-General.

WILLIAM R. HARR,
Special Assistant to the Attorney-General.

APPENDIX 1.

[Senate. Fifty-fifth Congress, second session. Report No. 591. Calendar No., 643.]

CARRIERS ENGAGED IN INTERSTATE COMMERCE AND THEIR EMPLOYEES.

[FEBRUARY 16, 1898.—Ordered to be printed.]

Mr. Kyle, from the Committee on Education and Labor, submitted the following report [to accompany S. 3662]:

The Committee on Education and Labor, having had under consideration the bill (S. 3662) concerning carriers engaged in interstate commerce and their employees, respectfully report as follows:

The measure under consideration may properly be called a voluntary arbitration bill, having for its object the settlement of disputes between capital and labor, as far as the interstate transportation companies are concerned. The necessity for the bill arises from the calamitous results in the way of ill-considered strikes arising from the tyranny of capital or the unjust demands of labor organizations, whereby the business of the country is brought to a standstill and thousands of employees, with their helpless wives and children, are confronted with starvation.

Bills similar to this have twice passed the House of Representatives with little objection from railway corporations or the organizations representing

their employees. The latter appeared through their representatives and were given a full hearing by your committee. The views of these men, together with a strong letter from Mr. Edward A. Moseley, secretary of the Interstate Commerce Commission, who also addressed the committee, are subjoined.

It is our opinion that this bill, should it become a law, would reduce to a minimum labor strikes which affect interstate commerce, and we therefore recommend its passage.

Letter of Ed. A. Moseley, Secretary of the Interstate Commerce Commission.

This bill carefully excludes from its operation all but common carriers by rail, engaged in interstate commerce, and their employees who are engaged in train service or train operation, namely, locomotive engineers, locomotive firemen, conductors, trainmen (which includes yardmen, switchmen, brakemen, etc.), and also railway telegraphers.

When an industry is of a strictly private character, the quarrels of employer and employed, so long as they do not result in a breach of the peace, do not interest the public generally, and may be left to go on indefinitely, even to the entire exhaustion of the parties and to the complete ruin of the industry itself; but the industry this bill deals with is of a public nature, and has often been so pronounced by the courts. It is wise to facilitate the speedy and peaceful settlement of the differences of those engaged in it, but the paramount duty is to take care that it shall go on at all hazards. Grievances are to be redressed, of course, with all the promptness which their investigation will permit; but in the interim the public interests must not suffer, and the business the bill is concerned with must go on with the least possible interruption. It is for that reason, among others, that the scope of the bill is limited as above stated. One of the main provisions of the bill is that the chairman of the Interstate Commerce Commission and the Commissioner of Labor are

jointly charged by the act with the duties of mediation and conciliation. No one will doubt their preeminent fitness for such duties.

That arbitration should be resorted to for the settlement of controversies between employers and their employees need not at this time be discussed. The only alternative is industrial wars, and they are as illogical, as brutal, and as wasteful as the wars by which international disputes are only too often accompanied.

Assuming arbitration to be both desirable and needful, what are the governing principles to be applied in providing for it, it being borne in mind that we are dealing with the one special industry carried on by common carriers engaged in interstate transportation? These principles relate to the tribunal of arbitration, the subjects of arbitration, the parties to the arbitration, the conduct of the parties pending the arbitration, the effect of the award and its enforcement.

The tribunal of arbitration should, it is believed, be a special body organized on fixed principles with reference to each particular case as it arises, rather than a permanent body with general jurisdiction over all cases.

The scheme of this bill is that when conciliation and mediation have failed a tribunal shall be organized in each particular case, one member of which shall be a representative of the employer, another a representative of organized labor, and these two are to select a third, except in cases where it otherwise can not be accomplished, when the Chairman of the Interstate Commerce Commission and the Commissioner of Labor shall so select.

The object of the framers of this bill has been to provide a remedy which shall commend itself largely to the judgment of both employer and employed, because it would be futile to attempt to fix a plan for settling disputes by beginning a dispute in the outset. But the power of the railway brotherhoods, acting more and more in friendly cooperation with the best and most liberal railway managers, will surely, with this bill having become a law, bring about a method of settling disputes that will be honorable to both parties, and the conclusions so reached will be satisfactory. In every dispute where arbitration is resorted to there must be a common

ground between the two sides; and there is when both adopt for their motto "Do ut des," "I give that you may give," instead of "You give all, while I give none."

While it is broadly asserted that the power of the wage-earner to mutiny or desert is the germ of all improvement in his condition, this principle, however applicable in a general sense, can not be fully applied in the case of the railroad and the railroad employee. Here certain obligations are due to the public which are not required in other industrial pursuits; and as these obligations are due to the public, so the public should, in justice, provide some means by which the disputes which arise between the employee and the railroad company may be fairly and honorably settled.

With the corporations as employers on one side and the organizations of railway employees as the other, there will be a measure of equality of power and force which will surely bring about the essential requisites of friendly relation, respect, consideration, and forbearance.

A prominent English economist has said that the reason of strikes is rather because of the weakness of organization than because of its strength; since, if the organization were powerful, the corporation in self-preservation would listen to almost any reasonable request or demand rather than precipitate a contest which would jeopardize the vast interests confided to its care and control.

It has been shown before the labor commission of England that where the associations are strong enough to command the respect of their employers the relations between employer and employee seem most amicable. For there the employers have learned the practical convenience of treating with one thoroughly representative body instead of with isolated fragments of workmen; and the labor associations have learned the limitations of their powers.

The men employed by the railways to conduct the transportation business of the country last year were 826,620. They constitute an army 98 per cent as large as the active German army, 73 per cent as large as the active army of France, six times as large as the active army of Great Britain, and more than thirty times as large as the standing army of the United States in these days. For every 79 inhabitants

of this country, men, women, and children, there was last year one railway employee, and one for every fifteen of the popular vote cast at the last Presidential election. The railway workers of the country number more men than the entire voting population of the States of New Hampshire, Vermont, Rhode Island, Delaware, Florida, North Dakota, South Dakota, Nevada, and Colorado—nine sovereign States—and if the railway employees had similar representation in Congress, they would be represented on its floors by eighteen Senators and fifteen Members of the House. The total number of railway employees make a body of people larger than the entire population of the States of Nevada, New Hampshire, Delaware, and the District of Columbia. Think for a moment what this grand army is, what destinies it holds in its hands, what power it exercises, what it refrains from exercising, and then remember that it is to be feared by no one, because it breathes and moves and has its being in the sacrificial love which every man feels for his hearth and those who cluster about it.

PEORIA, ILL., *February 12, 1898.*

SIR: The railway labor organizations represented by us are earnestly in favor of arbitration in disputes between railway companies and their employees as embodied in the bill introduced by Senator Lodge and the measure lately introduced by yourself. A similar bill has twice passed the House of Representatives, and a favorable report on the subject by the Senate committee has been presented by you. Two great political parties have inserted planks in their national platforms in favor of the arbitration sought by organizations of railway employees. Fifteen or more of the States have provided for the settlement of labor disputes by arbitration.

It is an essential part of any practical plan of arbitration that some Federal officer shall be charged with the duty of taking cognizance of an existing controversy between employees and the railway company at the outset, and endeavoring to conciliate or act as mediator with a view of securing prompt adjustment of the difficulties. In case of failure along that line such officer should endeavor to persuade the parties to adopt provided arbitration as the method of set-

tlement, and to do so before severance of the relations of employer and employee through declarations of war by either party.

Anyone familiar with the history of the relations between capital and labor must be convinced that in the matter of wages the efforts of labor organizations have, as a rule, been directed toward resisting reductions or securing restoration of wages formerly paid. In other words, they have acted on the defensive. This is eminently true of railway employees, and no class of employed persons can be more desirous of maintaining harmonious relations with their employers. It seems to be thoroughly conceded, also, that legislation by Congress, so as to provide arbitration in disputes arising from the semipublic duties in which railway men are engaged, is not only appropriate, but in line with the policy of Federal protection and regulation of interstate commerce.

We believe it is only consistent that an incorporation of employed persons should enjoy the same general privileges and immunities that are conferred upon corporations of capital.

After a very careful consideration of the entire question, we have no hesitancy in urging a favorable report on the bill by your committee, and we hope that it will speedily be placed upon the statute books.

Very respectfully,

E. E. CLARK,
Order Railway Conductors.
FRANK P. SARGENT,
Brotherhood Locomotive Firemen.
P. M. ARTHUR,
Brotherhood Locomotive Engineers.
P. H. MORRISEY,
Brotherhood Railroad Trainmen.
W. V. POWELL,
Order Railway Telegraphers.

Hon. JAMES H. KYLE,
Chairman Committee on Education and Labor,
United States Senate.

FEBRUARY 14, 1898.

DEAR SIR: That the principle of arbitration as a means for the settlement of disputes or misunderstandings between employer and employee is sound can not here be discussed; in fact, it is admitted on every side, and public opinion has on several occasions given a most emphatic expression of approval of this method of arriving at a satisfactory settlement of disputes between labor and employers of labor. Recognizing this forceful and potential influence, the great political parties indorsed the principle by declaring in favor of its enactment into law in their respective platforms.

The operations of this bill apply only to persons engaged in interstate commerce, and while no opposition to the bill has appeared before your committee, the five great brotherhoods of the railways of this country have, by letter, telegrams, and personal representation, petitioned your committee to report favorably on the measure.

The operations of this bill would unquestionably reduce the possibility of strikes to the minimum, and, indeed, those who seek its passage urge this as the primary cause for its adoption.

The organizations which I have the honor to represent before your committee are inspired to petition for the passage of this act by an experience in strikes, too often occasioned by insignificant if not trifling causes, which I am entirely convinced could have been avoided by arbitration such as is provided for in this measure.

The preliminary provision making the chairman of the Interstate Commerce Commission and the Commissioner of the Bureau of Labor mediators and conciliators to amicably and satisfactorily close any controversy arising between employer and employee is wisdom and in all probability will terminate 90 per cent of every question referred to them. I believe that the best way to end a strike (without sacrificing principle or honor) is to avoid it.

Please accept my thanks, and through me the thanks and appreciation of the organizations which I have the honor to

represent, for your kindness in permitting me to address your committee this morning in behalf of this bill.

Very respectfully,

W. F. HYNES.

Hon. JAMES H. KYLE,
Chairman Committee on Education and Labor,
United States Senate, Washington, D. C.

CHICAGO, ILL., *February 14, 1898.*

WILLIAM G. EDENS,
Assistant Superintendent Free Delivery System,
Washington, D. C.:

The Brotherhood of Railroad Trainmen is pledged to the principle of arbitration as a means of adjusting disputes between railway companies and their employees. I believe that if the arbitration bill becomes a law we will have seen the end of strikes and labor disturbances on railways. Thus railway interests will be made better and the employees will have the assurance that their individual and collective rights will not be disregarded. In the name of the Brotherhood of Railroad Trainmen you are commissioned to give the arbitration measure hearty indorsement.

P. H. MORRISSEY,
Grand Master.

DEPARTMENT OF LABOR,
Washington, D. C., February 14, 1898.

MY DEAR SIR: I am in receipt of your note of even date, handing me a copy of Senate bill No. 3653, concerning carriers engaged in interstate commerce and their employees. This bill, as I understand it, is precisely the same as House bill No. 4372.

In answer to your request for my opinion of the bill, I have to say that, so far as I am concerned, it meets my hearty approval, and I sincerely trust your committee will report the bill and that its action may be approved by the Congress. Broadly, it is a bill which in its provisions seeks to place labor on a more thorough business basis than it now occupies. In its most material sections it brings to labor organizations

an opportunity for really perfecting their work and for cooperating with the managers of railroads in preventing strikes and violence, in avoiding threats, and in eliminating intimidations. It also gives employees an opportunity to be heard, when receivers are in control of railroads, upon the question of the reduction of their wages and the conditions of their employment, should changes therein be sought by receivers. This section alone should bring the bill the unanimous support of railway employees.

I have heard it said that the bill provides for compulsory arbitration, but this is not true in any sense. It provides, so far as arbitration is concerned, for immediate action, first, to secure conciliation or mediation, and, failing in that, the constitution of a board of arbitration, the awards of which may be final, should the parties coming before it agree that they shall be. The rights, privileges, and prerogatives of both labor and capital, as represented in the operation of interstate railroads, are thoroughly secured and protected by the bill.

The bill, should it become a law, will not solve any phase of the labor problem nor prevent strikes entirely, but it will do much to steady the forces involved and afford a powerful and even effective balance wheel in interstate controversies. In the interest of successful railroad operation, which must be preserved in order to have our industries properly carried on, I trust your committee may report the bill favorably.

I am, respectfully,

CARROLL D. WRIGHT,
Commissioner.

Hon. JAMES H. KYLE,
Chairman Committee on Education and Labor,
United States Senate, Washington, D. C.

APPENDIX 2.

[House of Representatives. Report No. 454. 55th Congress, 2d session.]

CARRIERS ENGAGED IN INTERSTATE COMMERCE AND THEIR EMPLOYEES.

[FEBRUARY 15, 1898.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed.]

Mr. Gardner, from the Committee on Labor, submitted the following report [to accompany H. R. 4372]:

The Committee on Labor, to whom was referred the bill (H. R. 4372) concerning carriers engaged in interstate commerce and their employees, having had the same under consideration, recommend its passage with the following amendments:

On page 4, lines 27 and 28, strike out all after the word "First" and insert—

That the board of arbitration shall commence their hearings within five days from the date of the appointment of the third arbitrator, and shall find and file their award, as provided in this section, within twenty days from the date of the appointment of the third arbitrator; and that, pending the arbitration, the status existing immediately prior to the dispute shall not be changed.

On page 5, line 37, after the word "permit," strike out the words "except that," and in the same line, after the word "shall," insert the word "however."

On page 9, line 10, strike out the word "but" and insert a period (.).

On page 10, line 20, strike out the word "other," and after the word "employment" insert "or who shall, after the quitting of an employee, attempt or conspire to prevent such employee from obtaining employment."

Bills similar to this have twice before received the unanimous approval of the committee and twice passed the House of Representatives, but in each case too late to receive consideration in the Senate.

It is still true, as stated in a former report, that the proposition that public opinion is in favor of arbitration need not be discussed. It is universally conceded. Persons engaged in interstate commerce, who are most affected by the bill under consideration, have been anxious to secure the enactment into law of such a measure as would operate justly and effectively put an end to the industrial wars that have resulted from disputes growing out of the questions of wages, hours of labor, and the conditions of employment, between the employer and the employee.

The bill provides a board of conciliation, consisting of the Commissioner of Labor and the chairman of the Interstate Commerce Commission, whose duty it shall be, when a controversy concerning wages, hours of labor, or conditions of employment shall arise between a carrier subject to this act and the employees of such carrier, seriously interrupting or threatening to interrupt the business of said carrier, with all practicable expedition to put themselves in communication with the parties to such controversy and use their best efforts, by mediation and conciliation, to amicably settle the same; and, if such efforts shall be unsuccessful, to at once endeavor to bring about an arbitration of said controversy by submitting the same to a board consisting of three persons—

one to be chosen by the employees, one by the employer, and those two to select the third.

Mr. W. F. Hynes, representing the several national organizations of railway employees, appeared before your committee, as did others, all advocating this measure as amended.

The following communication, indorsing the bill and requesting its passage by the House, is submitted:

FEBRUARY 1, 1898.

SIR: The organization of railway employees represented by us is seeking the enactment of the arbitration bill (H. R. No. 4372) introduced by Mr. Grosvenor, of Ohio. Bills of similar character have twice received the approval of the committee and passed the House of Representatives. The two great political parties in their national conventions have declared in favor of arbitration as sought by the railway organizations from our national legislative body.

It is essentially necessary that there shall be some officer of the Government whose duty it shall be to take up the matter as to any disputes which may arise between railroad employer and employee, by conciliation or mediation, and, if unable to settle them in that way, to make every effort to secure the adoption of arbitration as a means of settlement. It is also very important that the proposition for arbitration shall be made before war has been declared and relation severed. Both these points are covered by the provisions of this measure.

The principle of applying arbitration as a means of settlement of disputes has been given much careful study, and the essential feature upon which we favor it is contained in this bill.

We believe it is but consistent that an incorporated organization of labor should enjoy the same general privileges and immunities that are enjoyed by corporations of capital.

After a very careful consideration of the entire question, we have no hesitancy in urging, on the part of your committee, a favorable report on the bill as amended, and we hope

for such speedy and favorable action as may be necessary to place this measure upon the statute books.

E. E. CLARK,
Order of Railway Conductors.
FRANK P. SARGENT,
Brotherhood of Locomotive Firemen.
P. M. ARTHUR,
Brotherhood of Locomotive Engineers.
P. H. MORRISSEY,
Brotherhood of Railroad Trainmen.
W. V. POWELL,
Order of Railroad Telegraphers.

Hon. JOHN J. GARDNER,
Chairman Committee on Labor.

The following letter, explanatory of the bill and advocating its passage, is also submitted:

DEPARTMENT OF LABOR,
Washington, D. C., February 10, 1898.

SIR: I am very glad to learn that your committee has unanimously agreed to report the bill (H. R. 4372) concerning carriers engaged in interstate commerce and their employees, and in answer to your suggestion I give you herewith, in brief, my views on this bill. I need hardly assure you that so far as I am concerned, it meets my hearty approval, and I sincerely trust the action of your committee relating to it may be approved by the Congress. Broadly, it is a bill which in its provisions seeks to place labor on a more thorough business basis than it now occupies. In its most material sections it brings to labor organizations an opportunity for really perfecting their work and for cooperating with the managers of railroads in preventing strikes and violence, in avoiding threats, and in eliminating intimidations. It also gives employees an opportunity to be heard, when receivers are in control of railroads, upon the question of the reduction of their wages and the conditions of their employment, should changes therein be sought by receivers. This section alone should bring the bill the unanimous support of railway employees.

I have heard it said that the bill provides for compulsory arbitration, but this is not true in any sense. It provides, so far as arbitration is concerned, for immediate action, first, to secure conciliation or mediation, and, failing in that, the constitution of a board of arbitration, the awards of which may be final, should the parties coming before it agree that they shall be. The rights, privileges, and prerogatives of both labor and capital, as represented in the operation of interstate railroads, are thoroughly secured and protected by the bill.

The bill, should it become a law, will not solve any phase of the labor problem, nor prevent strikes entirely, but it will do much to steady the forces involved, and afford a powerful and even effective balance wheel in interstate controversies. In the interest of successful railroad operation, which must be preserved in order to have our industries properly carried on, I trust the Congress will approve the unanimous action of your committee.

I am, very respectfully,

CARROLL D. WRIGHT,
Commissioner.

Hon. JOHN J. GARDNER,
Chairman Committee on Labor.

Many objections to former bills are met and obviated in the one under consideration. It seems to meet the views of all the parties directly interested, and to be objected to by none of them. Compulsory features are carefully avoided, and conciliation is made prominent. Great good is possible under it; further, great good is probable, while no injury can result. While it is not claimed that this difficult problem of arbitration is perfectly solved, yet it is believed to be a step forward in the right direction.

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ADAIR v. UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

No. 293. Argued October 29, 30, 1907.—Decided January 27, 1908.

It is not within the power of Congress to make it a criminal offense against the United States for a carrier engaged in interstate commerce, or an agent or officer thereof, to discharge an employé simply because of his membership in a labor organization; and the provision to that effect in § 10 of the act of June 1, 1898, 30 Stat. 424, concerning interstate carriers is an invasion of personal liberty, as well as of the right of property, guaranteed by the Fifth Amendment to the Constitution of the United States, and is therefore unenforceable as repugnant to the declaration of that amendment that no person shall be deprived of liberty or property without due process of law.

While the rights of liberty and property guaranteed by the Constitution against deprivation without due process of law, are subject to such reasonable restrictions as the common good or general welfare may require, it is not within the functions of government—at least in the absence of contract—to compel any person in the course of his business, and against his will, either to employ, or be employed by, another. An employer has the same right to prescribe terms on which he will employ one to labor as an employé has to prescribe those on which he will sell his labor, and any legislation which disturbs this equality is an arbitrary and unjustifiable interference with liberty of contract.

Quære, and not decided, whether it is within the power of Congress to make it a criminal offense against the United States for either an employer engaged in interstate commerce, or his employé, to disregard, without sufficient notice or excuse, the terms of a valid labor contract.

The power to regulate interstate commerce is the power to prescribe rules by which such commerce must be governed, but the rules prescribed must have a real and substantial relation to, or connection with, the commerce regulated, and as that relation does not exist between the membership of an employé in a labor organization and the interstate commerce with which he is connected, the provision above referred to in § 10 of the act of June 1, 1898 cannot be sustained as a regulation of interstate commerce and as such within the competency of Congress.

The power to regulate interstate commerce, while great and paramount, cannot be exerted in violation of any fundamental right secured by other provisions of the National Constitution.

The provision above referred to, in § 10 of the act of June 1, 1898, is severable, and its unconstitutionality may not affect other provisions of the act or provisions of that section thereof.

THE facts, which involve the constitutionality of § 10 of the act of Congress, concerning carriers engaged in interstate commerce (known as the Erdman Act), passed June 1, 1898, c. 370, 30 Stat. 424, are stated in the opinion.

Mr. Benjamin D. Warfield, with whom *Mr. Henry L. Stone* was on the brief, for plaintiff in error:

Section 10 is unconstitutional. If it affects commerce at all, it does so only obliquely, remotely, indirectly and collaterally. A regulation of commerce to come within the meaning of the commerce clause of the Constitution, must be direct and substantial, and not merely indirect, remote, incidental and collateral. Therefore § 10 was beyond the power of Congress to enact. *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211; *Hopkins* v. *United States*, 171 U. S. 578; *United States* v. *E. C. Knight Co.*, 156 U. S. 1; *Hooper* v. *California*, 105 U. S. 648, 654; *Williams* v. *Fears*, 179 U. S. 270, 278; *Munn* v. *Illinois*, 94 U. S. 113; *Mugler* v. *Kansas*, 123 U. S. 623, 661. See also *L. & N. R. Co.* v. *Kentucky*, 161 U. S. 677; *Smith* v. *Alabama*, 124 U. S. 465; *Sherlock* v. *Alling*, 93 U. S. 102; *L. S. & M. S. R. R. Co.* v. *Smith*, 173 U. S. 684.

The act under consideration does not prescribe any rule as to traffic or transportation. No rule whatever is laid down. There are no regulations to which the carrier is required to conform, or failing in obedience to which it is to be rendered liable in a civil or a criminal forum. The act is a bold attempt to regulate an ordinary relation of life—of master and servant—one hitherto supposed to be entirely within state control.

Section 10 violates the Fifth Amendment. It impairs, if it does not in fact destroy, the valuable property right of contract. Similar state statutes have been declared unconstitutional. *State* v. *Julow*, 31 S. W. Rep. 781; *Gillespie* v. *People*, 58 N. E. Rep. 1007; *State ex rel. Zillmer* v. *Kreutzberg*, 90

N. W. Rep. 1098; *People* v. *Marcus*, 77 N. E. Rep. 1073; *Wallace* v. *Georgia C. & N. Ry. Co.*, 22 S. E. Rep. 579; *New York &c. R. Co.* v. *Shaffer*, 62 N. E. Rep. 1036. See also *Shaver* v. *Pennsylvania Co.*, 71 Fed. Rep. 931; *Brewster* v. *Miller's Sons & Co.*, 101 Kentucky, 358; *Hundley* v. *L. & N. R. Co.*, 105 Kentucky, 162; *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Arthur* v. *Oakes*, 63 Fed. Rep. 310.

Section 10 is unconstitutional as class legislation. The classification is unreasonable. The statute attempts to confer privileges upon union labor that are not conferred upon non-union labor. No restraint whatever is imposed upon carriers with respect to discharging or discriminating against non-union laborers. However lawful it may be for employés to organize and become members of labor unions or associations, under our form of government, which guarantees equal privileges to all before the law, it is not competent for Congress, or state legislatures, to make such an unreasonable classification as in the statute before us, whereby union labor is preferred as against non-union labor. *Johnson* v. *Ry. Co.*, 43 Minnesota, 223; *S. C.*, 8 L. R. A. 419; *Gulf, Col. & Santa Fé Ry. Co.* v. *Ellis*, 165 U. S. 150; *Robertson* v. *Baldwin*, 165 U. S. 275.

The Attorney General and *Mr. William R. Harr*, Special Assistant to the Attorney General, for defendant in error:

Section 10 of the act has a clear and direct relation to interstate commerce. Its constitutionality is not to be determined by considering it separately from the other provisions of the act, as was done by Judge Evans in *United States* v. *Scott*, 148 Fed. Rep. 431. Considered in the light of the other provisions of the act and the purpose which pervades the entire statute, the relation of § 10 to interstate commerce is at once apparent. In construing statutes the whole statute and all of its parts are to be taken together. *Pennington* v. *Coxe*, 2 Cranch, 34.

The manifest purpose of the act is the protection of interstate and foreign commerce by the avoidance of strikes, lockouts, etc., which are the forms such interruptions usually assume.

The history of the act removes any doubt on this point. It was the result of the great railroad strike at Chicago in June-July, 1894. See Senate Rep. 591, 55th Cong., 2d Session; H. Rep. 454, 55th Cong., 2d Session.

It recognized the fact that such interruptions were not apt to assume serious proportions unless the employés were members of labor organizations and the latter became involved in it. Congress also recognized the fact that discrimination against employés because of their membership in a labor organization was calculated to bring on such disturbances. For the purpose, therefore, of preventing these interruptions, it provided means for the arbitration of disputes between the carriers and their employés through the labor organizations to which the latter belonged, and forbade discrimination against employés because of their membership in such organizations.

The relation of the inhibitions in § 10 to the general scheme for the protection of interstate commerce embodied in the act against interruption by strikes, lockouts, etc., is therefore apparent. Congress has the constitutional authority so to regulate the business of a common carrier engaged in interstate commerce as adequately to protect and safeguard the interests of such commerce.

The right of individuals or corporations to make contracts and do business is at all times subservient to the power of Congress to regulate interstate commerce, and common carriers are subject to greater control than private individuals by the State or Congress (according as their business is local or interstate), on account of the public nature of such business. See *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290; *United States* v. *Joint Traffic Association*, 171 U. S. 505; *Addyston Pipe and Steel Co.* v. *United States*, 175 U. S. 211; *United States* v. *Northern Securities Co.*, 193 U. S. 197; *United States* v. *Swift & Co.*, 196 U. S. 375.

When the business of the carrier is interstate, the power of the State to control the conduct of its business in the interest of the public health, safety or convenience is subject to the

paramount right of Congress over the subject, which may displace all state regulations by legislation of its own. *Gibbons* v. *Ogden*, 9 Wheat. 1, 210; *Nashville &c. Ry.* v. *Alabama*, 128 U. S. 96; *Hennington* v. *Georgia*, 163 U. S. 299, 317; *New York, New Haven & Hartford Ry. Co.* v. *New York*, 165 U. S. 628, 631; *Reid* v. *Colorado*, 187 U. S. 137. See also *Granger Cases*, 94 U. S. 113; *Wabash, St. Louis & Pacific Ry. Co.* v. *Illinois*, 118 U. S. 557; *B. & O. R. R. Co.* v. *Baugh*, 149 U. S. 368.

Although the Supreme Court has held that the act to regulate commerce did not confer upon the Interstate Commerce Commission the power to fix rates, *Cincinnati &c. Railway* v. *Interstate Comm. Comm.*, 162 U. S. 184; *Interstate Comm. Comm.* v. *Cincinnati &c. Railway*, 167 U. S. 479, in so doing it plainly recognized the plenary authority of Congress over the matter. See *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1, construing the safety-appliance act of March 2, 1893, and showing that Congress may change the common law rules of liability between master and servant in respect to common carriers engaged in interstate commerce; and may also legislate for the protection of employés of such common carriers.

The cases above referred to simply extend to interstate commerce by land the principles theretofore enumerated by the Supreme Court in reference to interstate commerce by water. Prior to the construction of railroads the plenary power of Congress over the navigable waters of the United States and the agencies and instrumentalities of interstate commerce thereon had been firmly established, and later cases confirm its power in that regard. *Gibbons* v. *Ogden*, 9 Wheat. 1; *United States* v. *Coombs*, 12 Pet. 72; *Waring* v. *Clarke*, 5 How. 441; *Sinnot* v. *Davenport*, 22 How. 240; *Gilman* v. *Philadelphia*, 3 Wall. 713; *The Daniel Ball*, 10 Wall. 557; *Bridge Co.* v. *United States*, 105 U. S. 470; *Escanaba Company* v. *Chicago*, 107 U. S. 678; *Williamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 1; *United States* v. *Bellingham Bay Boom Co.*, 176 U. S. 211.

These cases affirm the right of Congress to license, inspect and control vessels engaged in interstate commerce upon the navigable waters of the United States, and to exercise exclusive control over such highways in the interest of commerce and regulation thereon.

There is no invasion of the carrier's liberty by this statute. Congress has the right to control common carriers engaged in interstate commerce in the matter of the selection of their employés so far as it may be necessary for the protection of such commerce and the persons engaged in it, whether as shippers, passengers or employés.

Counsel rely on certain decisions, holding that a State had no authority to enact legislation forbidding discrimination by employers against members of labor organizations. *Gillespie* v. *The People*, 188 Illinois, 176; *State* v. *Julow*, 129 Missouri, 163; *State* v. *Kreutzerberg* (Wisconsin), 90 N. W. Rep. 1098.

The correctness of these decisions may be doubted. Such statutes do not deprive the employer of any lawful right. They simply protect the rights of the employés against invasion by the employer. The alleged right of the employer is a right to interfere with the liberty of his employés because they are in his service. See *Davis* v. *State*, 30 Ohio L. J. 342; 11 Ohio Dec. Reprint, 894.

The courts have nothing to do with the policy of legislation, the only question for them being as to the power of Congress over the subject. *United States* v. *Joint Traffic Association*, 171 U. S. 505. This statute does not come under the exception intimated in that case in the case of "a possible gross perversion of the principle" that Congress was the judge of the necessity and propriety of legislation for the proper protection of interstate commerce. *Lochner* v. *New York*, 198 U. S. 45, discussed and distinguished.

MR. JUSTICE HARLAN delivered the opinion of the court.

This case involves the constitutionality of certain provisions of the act of Congress of June 1, 1898, 30 Stat. 424, c. 370,

concerning carriers engaged in interstate commerce and their employés.

By the first section of the act it is provided: "That the provisions of this act shall apply to any common carrier or carriers and their officers, agents, and employés, except masters of vessels and seamen, as defined in section 4612, Revised Statutes of the United States, engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, for a continuous carriage or shipment, from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States. The term 'railroad' as used in this act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement or lease; and the term 'transportation' shall include all instrumentalities of shipment or carriage. The term 'employés' as used in this act shall include all persons actually engaged in any capacity in train operation or train service of any description, and notwithstanding that the cars upon or in which they are employed may be held and operated by the carrier under lease or other contract: Provided, however, That this act shall not be held to apply to employés of street railroads and shall apply only to employés engaged in railroad train service. In every such case the carrier shall be responsible for the acts and defaults of such employés in the same manner and to the same extent as if said cars were owned by it and said employés directly employed by it, and any provisions to the contrary of any such lease or other contract shall be binding only as between the parties thereto and shall not affect the obligations of said carrier either to the public or to the private parties concerned."

The 2d, 3d, 4th, 5th, 6th, 7th, 8th and 9th sections relate to the settlement, by means of arbitration, of controversies concerning wages, hours of labor, or conditions of employment arising between a carrier subject to the provisions of the act and its employés, which seriously interrupt or threaten to interrupt the business of the carrier. Those sections prescribe the mode in which controversies may be brought under the cognizance of arbitrators, in what way the arbitrators may be designated, and the effect of their decisions. The first subdivision of § 3 contains a proviso, "that no employé shall be compelled to render personal service without his consent."

The 11th section relates to the compensation and expenses of the arbitrators.

By the 12th section the act of Congress of October 1, 1888, 25 Stat. 501, c. 1063, creating boards of arbitrators or commissioners for settling controversies and differences between railroad corporations and other common carriers engaged in interstate or territorial transportation of persons or property and their employés, was repealed.

The 10th section, upon which the present prosecution is based, is in these words:

"That any employer subject to the provisions of this act and any officer, agent, or receiver of such employer, who shall require any employé, or any person seeking employment, as a condition of such employment, to enter into an agreement, either written or verbal, not to become or remain a member of any labor corporation, association, or organization; *or shall threaten any employé with loss of employment, or shall unjustly discriminate against any employé because of his membership in such a labor corporation, association, or organization;* or who shall require any employé or any person seeking employment, as a condition of such employment, to enter into a contract whereby such employé or applicant for employment shall agree to contribute to any fund for charitable, social, or beneficial purposes; to release such employer from legal liability for any personal injury by reason of any benefit received from

such fund beyond the proportion of the benefit arising from the employer's contribution to such fund; or who shall, after having discharged an employé, attempt or conspire to prevent such employé from obtaining employment, or who shall, after the quitting of an employé, attempt or conspire to prevent such employé from obtaining employment, is hereby declared to be guilty of a misdemeanor, and, upon conviction thereof in any court of the United States of competent jurisdiction in the district in which such offense was committed, shall be punished for each offense by a fine of not less than one hundred dollars and not more than one thousand dollars."

It may be observed in passing that while that section makes it a crime against the United States to unjustly discriminate against an employé of an interstate carrier because of his being a member of a labor organization, it does not make it a crime to unjustly discriminate against an employé of the carrier because of his *not* being a member of such an organization.

The present indictment was in the District Court of the United States for the Eastern District of Kentucky against the defendant Adair.

The first count alleged "that at and before the time hereinafter named the Louisville and Nashville Railroad Company is and was a railroad corporation, duly organized and existing by law and a common carrier engaged in the transportation of passengers and property wholly by steam railroad for a continuous carriage and shipment from one State of the United States to another State of the United States of America, that is to say, from the State of Kentucky into the States of Ohio, Indiana and Tennessee, and from the State of Ohio into the State of Kentucky, and was at all times aforesaid and at the time of the commission of the offense hereinafter named, a common carrier of interstate commerce, and an employer, subject to the provisions of a certain act of Congress of the United States of America, entitled, 'An Act concerning carriers engaged in interstate commerce and their employés,' approved June 1, 1898, and said corporation was not at any

time a street railroad corporation. That before and at the time of the commission of the offense hereinafter named one William Adair was an agent and employé of said common carrier and employer, and was at all said times master mechanic of said common carrier and employer in the district aforesaid, and before and at the time hereinafter stated one O. B. Coppage was an employé of said common carrier and employer in the district aforesaid, and as such employé was at all times hereinafter named actually engaged in the capacity of locomotive fireman in train operation and train service for said common carrier and employer in the transportation of passengers and property aforesaid, and was an employé of said common carrier and employer actually engaged in said railroad transportation and train service aforesaid, to whom the provisions of said act applied, and at the time of the commission of the offense hereinafter named said O. B. Coppage was a member of a certain labor organization, known as the Order of Locomotive Firemen, as he the said William Adair then and there well knew, a more particular description of said organization and the members thereof is to the grand jurors unknown."

The specific charge in that count was "that said William Adair, agent and employé of said common carrier and employer as aforesaid, in the district aforesaid, on and before the 15th day of October, 1906, did unlawfully and unjustly discriminate against said O. B. Coppage, employé as aforesaid, by then and there discharging said O. B. Coppage from such employment of said common carrier and employer, *because of his membership in said labor organization, and thereby did unjustly discriminate against an employé of a common carrier and employer engaged in interstate commerce because of his membership in a labor organization*, contrary to the forms of the statute in such cases made and provided, and against the peace and dignity of the United States."

The second count repeated the general allegations of the first count as to the character of the business of the Louisville

and Nashville Railroad Company and the relations between that corporation and Adair and Coppage. It charged "that said William Adair, in the district aforesaid and within the jurisdiction of this court, agent and employé of said common carrier and employer aforesaid, on and before the 15th day of October, 1906, did unlawfully *threaten said O. B. Coppage, employé as aforesaid, with loss of employment, because of his membership in said labor organization*, contrary to the forms of the statute in such cases made and provided, and against the peace and dignity of the United States."

The accused Adair demurred to the indictment as insufficient in law, but the demurrer was overruled. After reviewing the authorities, in an elaborate opinion, the court held the tenth section of the act of Congress to be constitutional. 152 Fed. Rep. 737. The defendant pleaded not guilty, and after trial a verdict was returned of guilty on the first count and a judgment rendered that he pay to the United States a fine of $100. We shall, therefore, say nothing as to the second count of the indictment.

It thus appears that the criminal offense charged in the count of the indictment upon which the defendant was convicted was, in substance and effect, that being an agent of a railroad company engaged in interstate commerce and subject to the provisions of the above act of June 1, 1898, he discharged one Coppage from its service *because of his membership in a labor organization*—no other ground for such discharge being alleged.

May Congress make it a criminal offense against the United States—as by the tenth section of the act of 1898 it does—for an agent or officer of an interstate carrier, having full authority in the premises from the carrier, to discharge an employé from service simply because of his membership in a labor organization?

This question is admittedly one of importance, and has been examined with care and deliberation. And the court has reached a conclusion which, in its judgment, is consistent

with both the words and spirit of the Constitution and is sustained as well by sound reason.

The first inquiry is whether the part of the tenth section of the act of 1898 upon which the first count of the indictment was based is repugnant to the Fifth Amendment of the Constitution declaring that no person shall be deprived of liberty or property without due process of law. In our opinion that section, in the particular mentioned, is an invasion of the personal liberty, as well as of the right of property, guaranteed by that Amendment. Such liberty and right embraces the right to make contracts for the purchase of the labor of others and equally the right to make contracts for the sale of one's own labor; each right, however, being subject to the fundamental condition that no contract, whatever its subject matter, can be sustained which the law, upon reasonable grounds, forbids as inconsistent with the public interests or as hurtful to the public order or as detrimental to the common good. This court has said that "in every well-ordered society, charged with the duty of conserving the safety of its members, the rights of the individual in respect of his liberty may, at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand." *Jacobson* v. *Massachusetts*, 197 U. S. 11, 29, and authorities there cited. Without stopping to consider what would have been the rights of the railroad company under the Fifth Amendment, had it been indicted under the act of Congress, it is sufficient in this case to say that as agent of the railroad company and as such responsible for the conduct of the business of one of its departments, it was the defendant Adair's right—and that right inhered in his personal liberty, and was also a right of property—to serve his employer as best he could, so long as he did nothing that was reasonably forbidden by law as injurious to the public interests. It was the right of the defendant to prescribe the terms upon which the services of Coppage would be accepted, and it was the right of Coppage to become or not,

as he chose, an employé of the railroad company upon the terms offered to him. Mr. Cooley, in his treatise on Torts, p. 278, well says: "It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice or malice. With his reasons neither the public nor third persons have any legal concern. It is also his right to have business relations with any one with whom he can make contracts, and if he is wrongfully deprived of this right by others, he is entitled to redress."

In *Lochner* v. *New York*, 198 U. S. 45, 53, 56, which involved the validity of a state enactment prescribing certain maximum hours for labor in bakeries, and which made it a misdemeanor for an employer to require or permit an employé in such an establishment to work in excess of a given number of hours each day, the court said: "The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution. *Allgeyer* v. *Louisiana*, 165 U. S. 578. Under that provision no State can deprive any person of life, liberty or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right. There are, however, certain powers, existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State in the exercise of those powers, and with such conditions the Fourteenth Amendment was not designed to interfere. *Mugler* v. *Kansas*, 123 U. S. 623; *In re Kemmler*, 136 U. S. 436; *Crowley* v. *Christensen*, 137 U. S. 86; *In re Converse*, 137 U. S. 624. . . . In every case that

comes before this court, therefore, where legislation of this character is concerned and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor." Although there was a difference of opinion in that case among the members of the court as to certain propositions, there was no disagreement as to the general proposition that there is a liberty of contract which cannot be unreasonably interfered with by legislation. The minority were of opinion that the business referred to in the New York statute was such as to require regulation, and that as the statute was not shown plainly and palpably to have imposed an unreasonable restraint upon freedom of contract, it should be regarded by the courts as a valid exercise of the State's power to care for the health and safety of its people.

While, as already suggested, the rights of liberty and property guaranteed by the Constitution against deprivation without due process of law, is subject to such reasonable restraints as the common good or the general welfare may require, it is not within the functions of government—at least in the absence of contract between the parties—to compel any person in the course of his business and against his will to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employé to quit the service of the employer,

for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employé. It was the legal right of the defendant Adair—however unwise such a course might have been—to discharge Coppage because of his being a member of a labor organization, as it was the legal right of Coppage, if he saw fit to do so—however unwise such a course on his part might have been—to quit the service in which he was engaged, because the defendant employed some persons who were not members of a labor organization. In all such particulars the employer and the employé have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land. These views find support in adjudged cases, some of which are cited in the margin.[1] Of course, if the parties by contract fix the period of service, and prescribe the conditions upon which the contract may be terminated, such contract would control the rights of the parties as between themselves, and for any violation of those provisions the party wronged would have his appropriate civil action. And it may be—but upon that point we express no opinion—that in the case of a labor contract between an employer engaged in interstate commerce and his employé, Congress could make it a crime for either party without sufficient or just excuse or notice to disregard the terms of such contract or to refuse to perform it. In the absence, however, of a valid contract between the parties controlling their conduct towards each other and fixing a period of service, it cannot be, we repeat, that an employer is under any legal obligation, against his will, to retain an employé in his personal service any more than an employé

[1] *People* v. *Marcus*, 185 N. Y. 257; *National Protection Assn.* v. *Cummings*, 170 N. Y. 315; *Jacobs* v. *Cohen*, 183 N. Y. 207; *State* v. *Julow*, 129 Missouri, 163; *State* v. *Goodwill*, 33 W. Va. 179; *Gillespie* v. *People*, 188 Illinois, 176; *State* v. *Kreutzberg*, 114 Wisconsin, 530; *Wallace* v. *Georgia, C. & N. Ry. Co.*, 94 Georgia, 732; *Hundley* v. *L. & N. R. R. Co.*, 105 Kentucky, 162; *Brewster* v. *Miller's Sons & Co.*, 101 Kentucky, 268; *N. Y. &c. R. R. Co.* v. *Schaffer*, 65 Ohio St. 414; *Arthur* v. *Oakes*, 63 Fed. Rep. 310.

can be compelled, against his will, to remain in the personal service of another. So far as this record discloses the facts the defendant, who seemed to have authority in the premises, did not agree to keep Coppage in service for any particular time, nor did Coppage agree to remain in such service a moment longer than he chose. The latter was at liberty to quit the service without assigning any reason for his leaving. And the defendant was at liberty, in his discretion, to discharge Coppage from service without giving any reason for so doing.

As the relations and the conduct of the parties towards each other was not controlled by any contract other than a general agreement on one side to accept the services of the employé and a general agreement on the other side to render services to the employer—no term being fixed for the continuance of the employment—Congress could not, consistently with the Fifth Amendment, make it a crime against the United States to discharge the employé because of his being a member of a labor organization.

But it is suggested that the authority to make it a crime for an agent or officer of an interstate carrier, having authority in the premises from his principal, to discharge an employé from service to such carrier, simply because of his membership in a labor organization, can be referred to the power of Congress to regulate interstate commerce, without regard to any question of personal liberty or right of property arising under the Fifth Amendment. This suggestion can have no bearing in the present discussion unless the statute, in the particular just stated, is within the meaning of the Constitution a regulation of commerce among the States. If it be not, then clearly the Government cannot invoke the commerce clause of the Constitution as sustaining the indictment against Adair.

Let us inquire what is commerce, the power to regulate which is given to Congress?

This question has been frequently propounded in this court, and the answer has been—and no more specific answer could

well have been given—that commerce among the several States comprehends traffic, intercourse, trade, navigation, communication, the transit of persons and the transmission of messages by telegraph—indeed, every species of commercial intercourse among the several States, but not to that commerce "completely internal, which is carried on between man and man, in a State, or between different parts of the same State, and which does not extend to or affect other States." The power to regulate interstate commerce is the power to prescribe rules by which such commerce must be governed.[1] Of course, as has been often said, Congress has a large discretion in the selection or choice of the means to be employed in the regulation of interstate commerce, and such discretion is not to be interfered with except where that which is done is in plain violation of the Constitution. *Northern Securities Co.* v. *United States*, 193 U. S. 197, and authorities there cited. In this connection we may refer to *Johnson* v. *Railroad*, 196 U. S. 1, relied on in argument, which case arose under the act of Congress of March 2, 1893, 27 Stat. 531, c. 196. That act required carriers engaged in interstate commerce to equip their cars used in such commerce with automatic couplers and continuous brakes, and their locomotives with driving wheel brakes. But the act upon its face showed that its object was to promote the safety of employés and travelers upon railroads; and this court sustained its validity upon the ground that it manifestly had reference to interstate commerce and was calculated to subserve the interests of such commerce by affording protection to employés and travelers. It was held that there was a substantial connection between the object sought to be attained by the act and the means provided to accomplish that object. So, in regard to *Employers' Liabil-*

[1] *Gibbons* v. *Ogden*, 9 Wheat. 1; *Passenger Cases*, 7 How. 283; *Almy* v. *State of California*, 24 How. 169; *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, 96 U. S. 1, 9, 12; *County of Mobile* v. *Kimball*, 102 U. S. 691; *Western Union Tel. Co.* v. *Pendleton*, 122 U. S. 347, 356; *Lottery Case*, 188 U. S. 321, 352; *Northern Securities Co.* v. *United States*, 193 U. S. 197; *Employers' Liability Cases*, 207 U. S. 463.

ity Cases, 207 U. S. 463, decided at the present term. In that case the court sustained the authority of Congress, under its power to regulate interstate commerce, to prescribe the rule of liability, as between interstate carriers and its employés in such interstate commerce, in cases of personal injuries received by employés while actually engaged in such commerce. The decision on this point was placed on the ground that a rule of that character would have direct reference to the conduct of interstate commerce, and would, therefore, be within the competency of Congress to establish for commerce among the States, but not as to commerce completely internal to a State. Manifestly, any rule prescribed for the conduct of interstate commerce, in order to be within the competency of Congress under its power to regulate commerce among the States, must have some real or substantial relation to or connection with the commerce regulated. But what possible legal or logical connection is there between an employé's membership in a labor organization and the carrying on of interstate commerce? Such relation to a labor organization cannot have, *in itself* and in the eye of the law, any bearing upon the commerce with which the employé is connected by his labor and services. Labor associations, we assume, are organized for the general purpose of improving or bettering the conditions and conserving the interests of its members as wage-earners—an object entirely legitimate and to be commended rather than condemned. But surely those associations as labor organizations have nothing to do with interstate commerce as such. One who engages in the service of an interstate carrier will, it must be assumed, faithfully perform his duty, whether he be a member or not a member of a labor organization. His fitness for the position in which he labors and his diligence in the discharge of his duties cannot in law or sound reason depend in any degree upon his being or not being a member of a labor organization. It cannot be assumed that his fitness is assured, or his diligence increased, by such membership, or that he is less fit or less diligent be-

cause of his not being a member of such an organization. It is the employé as a man and not as a member of a labor organization who labors in the service of an interstate carrier. Will it be said that the provision in question had its origin in the apprehension, on the part of Congress, that if it did not show more consideration for members of labor organizations than for wage-earners who were not members of such organizations, or if it did not insert in the statute some such provision as the one here in question, members of labor organizations would, by illegal or violent measures, interrupt or impair the freedom of commerce among the States? We will not indulge in any such conjectures, nor make them, in whole or in part, the basis of our decision. We could not do so consistently with the respect due to a coördinate department of the Government. We could not do so without imputing to Congress the purpose to accord to one class of wage-earners privileges withheld from another class of wage-earners engaged, it may be, in the same kind of labor and serving the same employer. Nor will we assume, in our consideration of this case, that members of labor organizations will, in any considerable numbers, resort to illegal methods for accomplishing any particular object they have in view.

Looking alone at the words of the statute for the purpose of ascertaining its scope and effect, and of determining its validity, we hold that there is no such connection between interstate commerce and membership in a labor organization as to authorize Congress to make it a crime against the United States for an agent of an interstate carrier to discharge an employé because of such membership on his part. If such a power exists in Congress it is difficult to perceive why it might not, by absolute regulation, require interstate carriers, under penalties, to employ in the conduct of its interstate business *only* members of labor organizations, or *only* those who are *not* members of such organizations—a power which could not be recognized as existing under the Constitution of the United States. No such rule of criminal liability as that to which

we have referred can be regarded as, in any just sense, a regulation of interstate commerce. We need scarcely repeat what this court has more than once said, that the power to regulate interstate commerce, great and paramount as that power is, cannot be exerted in violation of any fundamental right secured by other provisions of the Constitution. *Gibbons* v. *Ogden*, 9 Wheat. 1, 196; *Lottery Case*, 188 U. S. 321, 353.

It results, on the whole case, that the provision of the statute under which the defendant was convicted must be held to be repugnant to the Fifth Amendment and as not embraced by nor within the power of Congress to regulate interstate commerce, but under the guise of regulating interstate commerce and as applied to this case it arbitrarily sanctions an illegal invasion of the personal liberty as well as the right of property of the defendant Adair.

We add that since the part of the act of 1898 upon which the first count of the indictment is based, and upon which alone the defendant was convicted, is severable from its other parts, and as what has been said is sufficient to dispose of the present case, we are not called upon to consider other and independent provisions of the act, such, for instance, as the provisions relating to arbitration. This decision is therefore restricted to the question of the validity of the particular provision in the act of Congress making it a crime against the United States for an agent or officer of an interstate carrier to discharge an employé from its service because of his being a member of a labor organization.

The judgment must be reversed, with directions to set aside the verdict and judgment of conviction, sustain the demurrer to the indictment, and dismiss the case.

It is so ordered.

MR. JUSTICE MOODY did not participate in the decision of this case.

MR. JUSTICE McKENNA, dissenting.

The opinion of the court proceeds upon somewhat narrow

lines and either omits or does not give adequate prominence to the considerations which, I think, are determinative of the questions in the case. The principle upon which the opinion is grounded is, as I understand it, that a labor organization has no legal or logical connection with interstate commerce, and that the fitness of an employé has no dependence or relation with his membership in such organization. It is hence concluded that to restrain his discharge merely on account of such membership is an invasion of the liberty of the carrier guaranteed by the Fifth Amendment of the Constitution of the United States. The conclusion is irresistible if the propositions from which it is deduced may be viewed as abstractly as the opinion views them. May they be so viewed?

A summary of the act is necessary to understand § 10. Detach that section from the other provisions of the act and it might be open to condemnation.

The first section of the act designates the carriers to whom it shall apply. The second section makes it the duty of the Chairman of the Interstate Commerce Commission and the Commissioner of Labor, in case of a dispute between carriers and their employés which threatens to interrupt the business of the carriers, to put themselves in communication with the parties to the controversy and use efforts to "mediation and conciliation." If the efforts fail, then § 3 provides for the appointment of a board of arbitration—one to be named by the carrier, one by the labor organization to which the employés belong, and the two thus chosen shall select a third.

There is a provision that if the employés belong to different organizations they shall concur in the selection of the arbitrator. The board is to give hearings; power is invested in the board to summon witnesses, and provision is made for filing the award in the clerk's office of the Circuit Court of the United States for the district where the controversy arose. Other sections complete the scheme of arbitration thus outlined, and make, as far as possible, the proceedings of the arbitrators

judicial, and pending them put restrictions on the parties and damages for violation of the restrictions.

Even from this meager outline may be perceived the justification and force of § 10. It prohibits discrimination by a carrier engaged in interstate commerce, in the employment under the circumstances hereafter mentioned or the discharge from employment of members of labor organizations "*because of such membership.*" This the opinion condemns. The actions prohibited, it is asserted, are part of the liberty of a carrier protected by the Constitution of the United States from limitation or regulation. I may observe that the declaration is clear and unembarrassed by any material benefit to the carrier from its exercise. It may be exercised with reason or without reason, though the business of the carrier is of public concern. This, then, is the contention, and I bring its elements into bold relief to submit against them what I deem to be stronger considerations, based on the statute and sustained by authority.

I take for granted that the expressions of the opinion of the court, which seem to indicate that the provisions of § 10 are illegal because their violation is made criminal, are used only for description and incidental emphasis, and not as the essential ground of the objections to those provisions.

I may assume at the outset that the liberty guaranteed by the Fifth Amendment is not a liberty free from all restraints and limitations, and this must be so or government could not be beneficially exercised in many cases. Therefore in judging of any legislation which imposes restraints or limitations the inquiry must be, what is their purpose and is the purpose within one of the powers of government? Applying this principle immediately to the present case without beating about in the abstract, the inquiry must be whether § 10 of the act of Congress has relation to the purpose which induced the act and which it was enacted to accomplish, and whether such purpose is in aid of interstate commerce and not a mere restriction upon the liberty of carriers to employ whom they please, or to have business relations with whom they please. In the inquiry there

is necessarily involved a definition of interstate commerce and of what is a regulation of it. As to the first, I may concur with the opinion; as to the second, an immediate and guiding light is afforded by the *Employers' Liability Cases*, recently decided, 207 U. S. 463. In those cases there was a searching scrutiny of the powers of Congress, and it was held to be competent to establish a new rule of liability of the carrier to his employés—in a word, competent to regulate the relation of master and servant, a relation apparently remote from commerce, and one which was earnestly urged by the railroad to be remote from commerce. To the contention the court said: "But we may not test the power of Congress to regulate commerce solely by abstractly considering the broad subject to which a regulation relates, irrespective of whether the regulation in question is one of interstate commerce. On the contrary, the test of power is not merely the matter regulated, but whether the regulation is directly one of interstate commerce or is embraced within the grant conferred on Congress to use all lawful means necessary and appropriate to the execution of that power to regulate commerce." In other words, that the power is not confined to a regulation of the mere movement of goods or persons.

And there are other examples in our decisions—examples, too, of liberty of contract and liberty of forming business relations (made conspicuous as grounds of decision in the present case)—which were compelled to give way to the power of Congress. *Northern Securities Company* v. *United States*, 193 U. S. 197. In that case exactly the same definitions were made as made here and the same contentions were pressed as are pressed here. The Northern Securities Company was not a railroad company. Its corporate powers were limited to buying, selling and holding stock, bonds and other securities, and, it was contended, that as such business was not commerce at all it could not be within the power of Congress to regulate. The contention was not yielded to, though it had the support of members of this court. Asserting the application of the Anti-

Trust Act of 1890 to such business and the power of Congress to regulate it, the court said "that a sound construction of the Constitution allows to Congress a large discretion 'with respect to the means by which the powers it [the commerce clause] confers are to be carried into execution, which enables that body to perform the high duties assigned to it, in the manner most beneficial to the people.'" It was in recognition of this principle that it was declared in *United States* v. *Joint Traffic Association*, 171 U. S. 571: "The prohibition of such contracts [contracts fixing rates] may in the judgment of Congress be one of the reasonable necessities of proper regulation of commerce, and Congress is the *judge* of such necessity and propriety, unless, *in case of a possible gross perversion of the principle*, the courts might be applied to for relief." The contentions of the parties in the case invoked the declaration. There as here an opposition was asserted between the liberty of the railroads to contract with one another and the power of Congress to regulate commerce. That power was pronounced paramount, and it was not perceived, as it seems to be perceived now, that it was subordinate and controlled by the provisions of the Fifth Amendment. Nor was the relation of the power of Congress to that amendment overlooked. It was commented upon and reconciled. And there is nothing whatever in *Gibbons* v. *Ogden*, 9 Wheat. 1, or in *Lottery Case*, 188 U. S. 321, which is to the contrary.

From these considerations we may pass to an inspection of the statute of which § 10 is a part, and inquire as to its purpose, and if the means which it employs has relation to that purpose and to interstate commerce. The provisions of the act are explicit and present a well coördinated plan for the settlement of disputes between carriers and their employés, by bringing the disputes to arbitration and accommodation, and thereby prevent strikes and the public disorder and derangement of business that may be consequent upon them. I submit no worthier purpose can engage legislative attention or be the object of legislative action, and, it might be urged,

to attain which the congressional judgment of means should not be brought under a rigid limitation and condemned, if it contribute in any degree to the end, as a "gross perversion of the principle" of regulation, the condition which, it was said in *United States* v. *Joint Traffic Association*, *supra*, might justify an appeal to the courts.

We are told that labor associations are to be commended. May not then Congress recognize their existence; yes, and recognize their power as conditions to be counted with in framing its legislation? Of what use would it be to attempt to bring bodies of men to agreement and compromise of controversies if you put out of view the influences which move them or the fellowship which binds them—maybe controls and impels them—whether rightfully or wrongfully, to make the cause of one the cause of all? And this practical wisdom Congress observed—observed, I may say, not in speculation of uncertain provision of evils, but in experience of evils—an experience which approached to the dimensions of a National calamity. The facts of history should not be overlooked, nor the course of legislation. The act involved in the present case was preceded by one enacted in 1888 of similar purport. 25 Stat. 501, c. 1063. That act did not recognize labor associations, or distinguish between the members of such associations and the other employés of carriers. It failed in its purpose, whether from defect in its provisions or other cause we may only conjecture. At any rate, it did not avert the strike at Chicago in 1894. Investigation followed, and, as a result of it, the act of 1898 was finally passed. Presumably its provisions and remedy were addressed to the mischief which the act of 1888 failed to reach or avert. It was the judgment of Congress that the scheme of arbitration might be helped by engaging in it the labor associations. Those associations unified bodies of employés in every department of the carriers, and this unity could be an obstacle or an aid to arbitration. It was attempted to be made an aid, but how could it be made an aid if, pending the efforts of "mediation and conciliation"

of the dispute, as provided in § 2 of the act, other provisions of the act may be arbitrarily disregarded, which are of concern to the members in the dispute? How can it be an aid, how can controversies which may seriously interrupt or threaten to interrupt the business of carriers (I paraphrase the words of the statute), be averted or composed if the carrier can bring on the conflict or prevent its amicable settlement by the exercise of mere whim and caprice? I say mere whim or caprice, for this is the liberty which is attempted to be vindicated as the Constitutional right of the carriers. And it may be exercised in mere whim and caprice. If ability, the qualities of efficient and faithful workmanship can be found outside of labor associations, surely they may be found inside of them. Liberty is an attractive theme, but the liberty which is exercised in sheer antipathy does not plead strongly for recognition.

There is no question here of the right of a carrier to mingle in his service "union" and "non-union" men. If there were, broader considerations might exist. In such a right there would be no discrimination for the "union" and no discrimination against it. The efficiency of an employé would be its impulse and ground of exercise.

I need not stop to conjecture whether Congress could or would limit such right. It is certain that Congress has not done so by any provision of the act under consideration. Its letter, spirit and purpose are decidedly the other way. It imposes, however, a restraint, which should be noticed. The carriers may not require an applicant for employment or an employé to agree not to become or remain a member of a labor organization. But this does not constrain the employment of anybody, be he what he may.

But it is said it cannot be supposed that labor organizations will, "by illegal or violent measures, interrupt or impair the freedom of commerce," and to so suppose would be disrespect to a coördinate branch of the Government and to impute to it a purpose "to accord to one class of wage-earners privileges withheld from another class of wage-earners engaged, it may

be, in the same kind of labor and serving the same employer." Neither the supposition nor the disrespect is necessary, and, it may be urged, they are no more invidious than to impute to Congress a careless or deliberate or purposeless violation of the Constitutional rights of the carriers. Besides, the legislation is to be accounted for. It, by its letter, makes a difference between members of labor organizations and other employés of carriers. If it did not, it would not be here for review. What did Congress mean? Had it no purpose? Was it moved by no cause? Was its legislation mere wantonness and an aimless meddling with the commerce of the country? These questions may find their answers in *In re Debs*, 158 U. S. 564.

I have said that it is not necessary to suppose that labor organizations will violate the law, and it is not. Their power may be effectively exercised without violence or illegality, and it cannot be disrespect to Congress to let a committee of the Senate speak for it and tell the reason and purposes of its legislation. The Committee on Education in its report said of the bill: "The measure under consideration may properly be called a voluntary arbitration bill, having for its object the settlement of disputes between capital and labor, as far as the interstate transportation companies are concerned. The necessity for the bill arises from the calamitous results in the way of ill-considered strikes arising from the tyranny of capital or the unjust demands of labor organizations, whereby the business of the country is brought to a standstill and thousands of employés, with their helpless wives and children, are confronted with starvation." And, concluding the report, said: "It is our opinion that this bill, should it became a law, would reduce to a minimum labor strikes which affect interstate commerce, and we therefore recommend its passage."

With the report was submitted a letter from the Secretary of the Interstate Commerce Commission, which expressed the judgment of that body, formed, I may presume, from experience of the factors in the problem. The letter said: "With the corporations as employers on one side and the organiza-

tions of railway employés as the other, there will be a measure of equality of power and force which will surely bring about the essential requisites of friendly relation, respect, consideration, and forebearance." And again: "It has been shown before the labor commission of England that where the associations are strong enough to command the respect of their employers the relations between employer and employé seem most amicable. For there the employers have learned the practical convenience of treating with one thoroughly representative body instead of with isolated fragments of workmen; and the labor associations have learned the limitations of their powers."

It is urged by defendant in error that "there is a marked distinction between a power to regulate commerce and a power to regulate the affairs of an individual or corporation engaged in such commerce," and how can it be, it is asked, a regulation of commerce to prevent a carrier from selecting his employés or constraining him to keep in his service those whose loyalty to him is "seriously impaired, if not destroyed, by their prior allegiance to their labor unions"? That the power of regulation extends to the persons engaged in interstate commerce is settled by decision. *Employers' Liability Cases*, 207 U. S. 463, and the cases cited in Mr. Justice Moody's dissenting opinion. The other proposition points to no evil or hazard of evil. Section 10 does not constrain the employment of incompetent workmen and gives no encouragement or protection to the disloyalty of an employé or to deficiency in his work or duty. If guilty of either he may be instantly discharged without incurring any penalty under the statute.

Counsel also makes a great deal of the difference between direct and indirect effect upon interstate commerce, and assert that § 10 is an indirect regulation at best and not within the power of Congress to enact. Many cases are cited, which, it is insisted, sustain the contention. I cannot take time to review the cases. I have already alluded to the contention, and it is enough to say that it gives too much isolation to § 10.

The section is part of the means to secure and make effective the scheme of arbitration set forth in the statute. The contention, besides, is completely answered by *Employers' Liability Cases, supra*. In that case, as we have seen, the power of Congress was exercised to establish a rule of liability of a carrier to his employés for personal injuries received in his service. It is manifest that the kind or extent of such liability is neither traffic nor intercourse, the transit of persons or the carrying of things. Indeed such liability may have wider application than to carriers. It may exist in a factory; it may exist on a farm, and in both places, or in commerce—its direct influence might be hard to find or describe. And yet this court did not hesitate to pronounce it to be within the power of Congress to establish. "The primary object," it was said in *Johnson* v. *Railroad*, 196 U. S. 17, of the safety appliance act, "was to promote *the public welfare* by securing the safety of employés and travelers." The rule of liability for injuries is even more round about in its influence on commerce and as much so as the prohibition of § 10. To contend otherwise seems to me to be an oversight of the proportion of things. A provision of law which will prevent or tend to prevent the stoppage of every wheel in every car of an entire railroad system certainly has as direct influence on interstate commerce as the way in which one car may be coupled to another, or the rule of liability for personal injuries to an employé. It also seems to me to be an oversight of the proportions of things to contend that in order to encourage a policy of arbitration between carriers and their employés which may prevent a disastrous interruption of commerce, the derangement of business, and even greater evils to the public welfare, Congress cannot restrain the discharge of an employé, and yet can, to enforce a policy of unrestrained competition between railroads, prohibit reasonable agreements between them as to the rates at which merchandise shall be carried. And mark the contrast of what is prohibited. In the one case the restraint, it may be, of a whim—certainly of nothing that affects the ability of an employé to perform his

duties; nothing, therefore, which is of any material interest to the carrier; in the other case a restraint of a carefully considered policy which had as its motive great material interests and benefits to the railroads, and, in the opinion of many, to the public. May such action be restricted, must it give way to the public welfare, while the other, moved, it may be, by prejudice and antagonism, is intrenched impregnably in the Fifth Amendment of the Constitution against regulation in the public interest.

I would not be misunderstood. I grant that there are rights which can have no material measure. There are rights which, when exercised in a private business, may not be disturbed or limited. With them we are not concerned. We are dealing with rights exercised in a *quasi*-public business and therefore subject to control in the interest of the public.

I think the judgment should be affirmed.

Mr. Justice Holmes, dissenting.

I also think that the statute is constitutional, and but for the decision of my brethren I should have felt pretty clear about it.

As we all know, there are special labor unions of men engaged in the service of carriers. These unions exercise a direct influence upon the employment of labor in that business, upon the terms of such employment and upon the business itself. Their very existence is directed specifically to the business, and their connection with it is at least as intimate and important as that of safety couplers, and, I should think, as the liability of master to servant, matters which, it is admitted, Congress might regulate, so far as they concern commerce among the States. I suppose that it hardly would be denied that some of the relations of railroads with unions of railroad employés are closely enough connected with commerce to justify legislation by Congress. If so, legislation to prevent the exclusion of such unions from employment is sufficiently near.

The ground on which this particular law is held bad is not so much that it deals with matters remote from commerce among the States, as that it interferes with the paramount individual rights, secured by the Fifth Amendment. The section is, in substance, a very limited interference with freedom of contract, no more. It does not require the carriers to employ any one. It does not forbid them to refuse to employ any one, for any reason they deem good, even where the notion of a choice of persons is a fiction and wholesale employment is necessary upon general principles that it might be proper to control. The section simply prohibits the more powerful party to exact certain undertakings, or to threaten dismissal or unjustly discriminate on certain grounds against those already employed. I hardly can suppose that the grounds on which a contract lawfully may be made to end are less open to regulation than other terms. So I turn to the general question whether the employment can be regulated at all. I confess that I think that the right to make contracts at will that has been derived from the word liberty in the amendments has been stretched to its extreme by the decisions; but they agree that sometimes the right may be restrained. Where there is, or generally is believed to be, an important ground of public policy for restraint the Constitution does not forbid it, whether this court agrees or disagrees with the policy pursued. It cannot be doubted that to prevent strikes, and, so far as possible, to foster its scheme of arbitration, might be deemed by Congress an important point of policy, and I think it impossible to say that Congress might not reasonably think that the provision in question would help a good deal to carry its policy along. But suppose the only effect really were to tend to bring about the complete unionizing of such railroad laborers as Congress can deal with, I think that object alone would justify the act. I quite agree that the question what and how much good labor unions do, is one on which intelligent people may differ,—I think that laboring men sometimes attribute to them advantages, as

many attribute to combinations of capital disadvantages, that really are due to economic conditions of a far wider and deeper kind—but I could not pronounce it unwarranted if Congress should decide that to foster a strong union was for the best interest, not only of the men, but of the railroads and the country at large.